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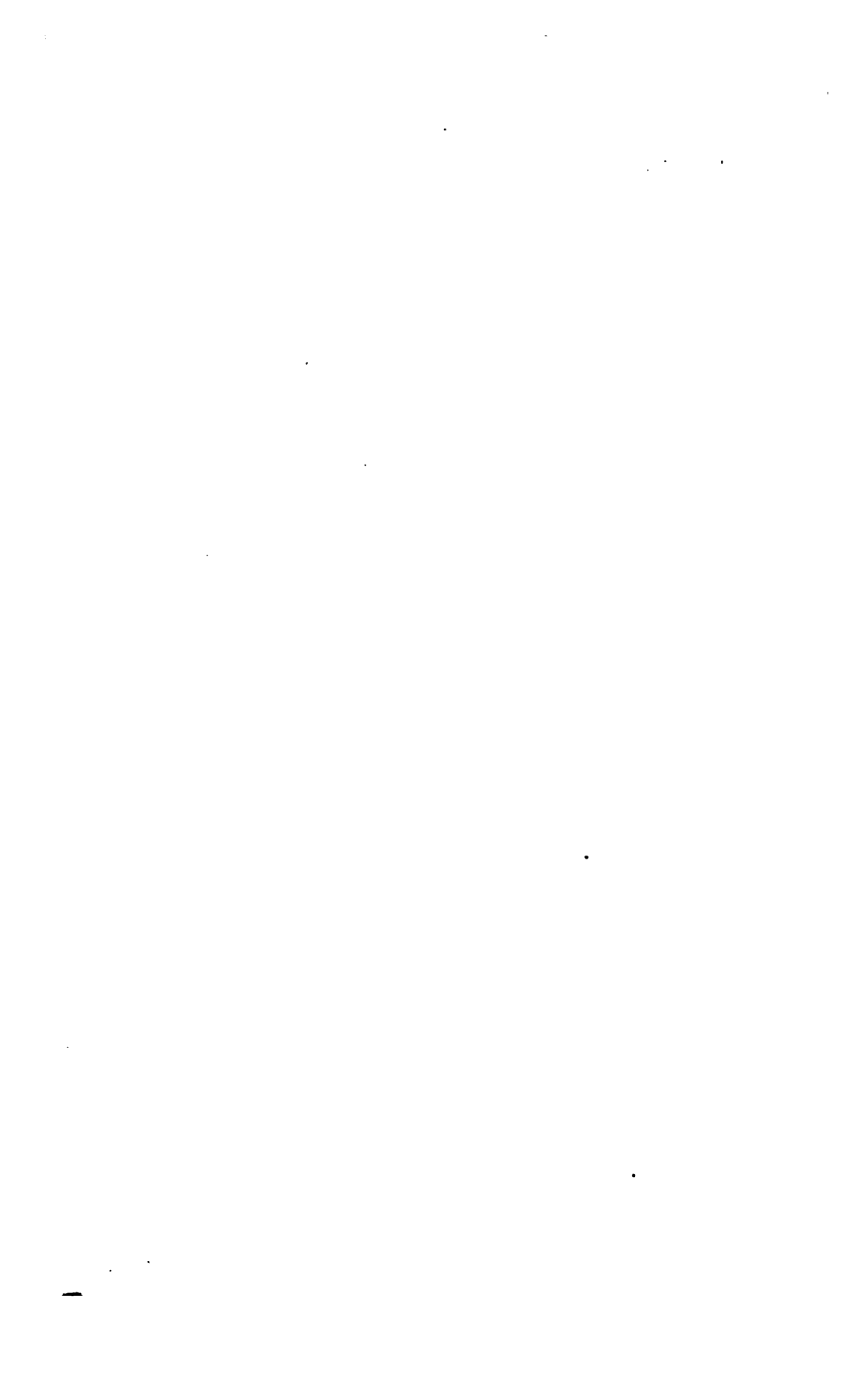
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15. 10. 1836. 1. 11. 1836

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

King's Bench Practice Court;

WITH THE

POINTS OF PLEADING AND PRACTICE

DECIDED IN THE COURTS OF

Common Pleas and Exchequer;

FROM

TRINITY TERM, 1835, TO HILARY TERM, 1836.

—♦—
BY

ALFRED S. DOWLING, ESQ.

OF GRAY'S INN, BARRISTER AT LAW.

—♦—
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ERRATA.

- Page 488, marginal note, after "*indebitatus*," read "and."
 „ 651, line 11, for "imperative," read "important."
 „ 759, *dele* second part of marginal note.

REPORTS OF CASES

DETERMINED ON

POINTS OF PRACTICE.

KING'S BENCH PRACTICE COURT.

Trinity Term,

IN THE FIFTH YEAR OF THE REIGN OF WILLIAM IV.

GOODALL v. RAY.

1835.

AMOS shewed cause against a rule obtained by *N. Clarke*, for reviewing the Master's taxation. At *Nisi Prius*, a verdict was found for the plaintiff, subject to a reference. A rule had been obtained for setting aside the award of the arbitrator, and the Court decided that it should stand for a sum of 22*l.* 10*s.* in favour of the plaintiff. When the Master came to tax the costs, he allowed the plaintiff the costs of shewing cause against the rule for setting aside the award, as costs in the cause; on the ground, that the plaintiff had ultimately succeeded, by a verdict for a certain sum being ordered to be entered in his favour. This mode of taxation, it was submitted, was correct; as all costs which accrued down to the time when the question as to who was ultimately entitled to the

The costs of shewing cause against a rule for setting aside an award are costs in the cause, and the party who ultimately has the verdict in his favour is entitled to have them taxed to him, notwithstanding the other party succeeds in part of his application.

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verdict was decided, must be considered as costs in the cause; and that, in the present instance, if the defendant's application had been confined to the reduction of damages, *non constat* that the plaintiff would have incurred any, or at least the same costs in resisting it.

N. Clarke, contra, submitted that the plaintiff could not be entitled to the costs of shewing cause, as costs in the cause, under the circumstances of this case. All that he could be entitled to was, to be freed from paying the defendant's costs. The arbitrator in this case had stated special facts for the consideration of the Court; and on them the Court had pronounced an opinion. The Court, after taking time to consider, reduced the amount of damages originally directed by the arbitrator from 171*l.*, to 22*l.* 10*s.* In *Lewis v. Harris* (a), the marginal note was "a rule for setting aside an inquisition before the sheriff for excessive damages. The matter was referred, nothing being said about the costs of the application. The arbitrator, by his award having reduced the damages, it was held, that the plaintiff was not entitled to the costs of the application." In the present case, the amount originally awarded by the arbitrator was reduced, and therefore the plaintiff could not be entitled to the costs of shewing cause, where each party ought to pay his own. Proceedings for setting aside an award, or for the discussion of it, were not like an application for a new trial, where a different course of practice might be adopted.

COLERIDGE, J.—I should have thought, that the good sense of the practice would have been, that each party should pay his own costs. But the practice has always been to consider these costs as costs in the cause; and I can conceive a good reason for such a technical rule.

(a) 2 B. & C. 620.

There is in fact no verdict until the discussion of the award is over; and therefore all proceedings until then, are steps in the cause. Until the recent statute, it was always the course with special cases to consider all expenses attending them, as costs in the cause. Therefore, I do not think I am at liberty to disturb the practice of the Court as to awards, when the power of the legislature was necessary to alter the practice as to special cases. I think the present rule must therefore be discharged.

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Rule discharged.

WOOLLASTON v. WESTON.

CHANNELL shewed cause against a rule obtained by *Butt*, for rescinding an order made by Mr. Justice *Williams*, referring the defendant's attorney's bill for taxation. The facts, as they appeared in the affidavits, were these.—The application was made at the instance of the executor of the defendant. The bill was for business done during the period from the year 1826 to the year 1831. At that time, the bill was delivered. The deceased went over the bill with the attorney's clerk, expressed his satisfaction with it, and paid a sum of money on account. The question was, whether the Court would refer an attorney's bill under those circumstances for taxation. The general rule was, that so long as an attorney's bill was unpaid, the client was entitled to have it taxed, unless there was some act done which amounted to an acquiescence in the account. The mere payment of a portion of the bill and the satisfaction expressed by the client, did not constitute such an acquiescence as would deprive him of his right to have the bill taxed.

A client is entitled to have his attorney's bill taxed, although he may have expressed his satisfaction at the bills, paid a sum on account, and allowed four years to elapse from the delivery of the bills before he applies for an order to tax.

Butt, in support of the rule, contended, that a payment

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on account, an expression of satisfaction with the bill, and the lapse of four years, sufficiently shewed that the client acquiesced in the attorney's demand, so as to prevent the Court from ordering its taxation.

COLERIDGE, J.—I am of opinion that this rule should be discharged. The client stands upon the general rule, that so long as a bill remains unpaid he is entitled to have the bill taxed. This bill, therefore, is liable to taxation, unless the attorney relieves himself from the general rule, by shewing circumstances tantamount to payment. The question, then, is, whether on the state of facts disclosed in these affidavits, there is sufficient to shew anything equivalent to payment. Here there was a specific payment on part of this bill. It being delivered, the attorney's clerk waits on the client, and the bills are examined. The client then expresses his satisfaction at all the charges. Supposing this to have been the case, that is not tantamount to payment. Then it is said, that a sum was paid on account of the bill. If one sum were paid on account of the bill, I do not think that is a sufficient payment to prevent the bill from being taxed. As to the lapse of four years, I do not think that is enough to preclude the client from taxing the attorney's bill. Besides, it is not quite clear, that the payment was made on account of the bill. I think the present rule ought to be discharged.

Rule discharged.

1835.

PRINCE v. SAMO.

SIR FREDERICK POLLOCK shewed cause against a rule obtained by *Sir William Follett*, for issuing a commission to *Buenos Ayres*, under 1 Will. 4, c. 22, s. 4. The only objection which he had to the application was, that it should be made a term on which the rule was to be granted, that the costs of the commission should be paid by the defendant, at whose instance the rule had been obtained.

The costs of executing a commission in a foreign country, under 1 W. 4, c. 22, s. 4, are costs in the cause, unless some special ground is laid for ordering otherwise.

Sir William Follett, in support of the rule, contended, that no such term ought to be imposed, but that the costs ought to be costs in the cause.

COLERIDGE, J.—By sec. 11 of the statute, those costs are directed to be costs in the cause, unless otherwise directed; either by the judge making such rule or order, or by the Judge before whom the cause may be tried, or by the Court. No reason is here given for altering the usual course of such costs being costs in the cause; and therefore, the rule must be made absolute without the introduction of any such condition.

Rule absolute accordingly.

MOORE v. CLAY.

ADDISON moved for a rule to discharge a defendant under the 48 Geo. 3, c. 123, he having remained in execution twelve successive calendar months, for a sum not

If a prisoner seeking his discharge under 48 Geo. 3, c. 123, for a debt not exceeding 20*l*,

has not given ten days' notice of his application, the rule for his discharge will only be *nisi* in the first instance.

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exceeding 20*l*. The affidavits on which he moved contained all the requisites, but it did not appear that ten days' notice had been given pursuant to 1 *Reg. Gen. H. T. 2 Will. 4*, s. 90 (*a*), the words of which were, "a rule or order for the discharge of a debtor, who has been detained in execution a year, for a debt under 20*l*., may be made absolute in the first instance, on an affidavit of notice given ten days before the intended application, which notice may be given before the year expires." The question, therefore, was, whether, as no notice had been given, he was entitled to a rule absolute or *nisi*, in the first instance.

COLERIDGE, J.—The required notice not having been given, the rule for the defendant's discharge must be *nisi* in the first instance.

Rule *nisi* granted accordingly.

(*a*) Ante, vol. 1, p. 195.

BARSTON v. TRUTCH.

(*Before the four Judges.*)

A writ of *ca. sa.* directed to the coroner, on the ground of the sheriff being interested, need not recite that fact, nor need any suggestion to that effect be entered on record previous to suing out such a writ.

The defendant is sufficiently charged in execution if in custody at the

time, at the suit of another person, by the writ indorsed by the coroner being lodged with the county gaoler at the gaol.

CROWDER shewed cause against a rule *nisi* obtained by *Archbold*, for setting aside the writ of *ca. sa.*, on which the defendant in this case had been charged in execution, on the ground of its being directed to the coroner of the county instead of the sheriff, there being no recital on the writ, or suggestion on the record, that the sheriff was interested, and therefore, that there appeared no reason for not directing it to the sheriff. A second objection was, that the defendant had never been in point of law charged in execution on the *ca. sa.* The facts of the case were

these. A writ of *capias* had been issued, directed to the plaintiff, as the high sheriff for the county of *Devon*, against the defendant. On this, the latter was taken, but he subsequently escaped. The plaintiff in the action then proceeded against the sheriff, and he ultimately paid the amount of debt and costs. For this debt and costs, so paid, the sheriff sued the defendant, and the latter gave a *cognovit* for the amount. Judgment was afterwards signed on this *cognovit*, and a *ca. sa.* sued out. The sheriff being an interested party in the cause, the writ was directed to the coroner. At that time *Trutch* was in the custody of the sheriff, in the county gaol, at the suit of another plaintiff. The coroner, therefore, did not make out any warrant on the writ, but having indorsed it, it was taken to the gaoler, and left with him. As to the first objection, there was no authority to shew that it was necessary any suggestion should be placed upon the writ to account for its being directed to the coroner, and not the sheriff. Such a suggestion might be necessary on making up the record, but was not so previous to suing out the writ of execution. But by 1 *Reg. Gen. H. T. 2 Will. 4*, s. 95 (a), it was directed, that "in order to charge a defendant in execution, it shall not be necessary that the proceedings be entered of record." If any suggestion were necessary, it would be presumed in favour of the process sued out, that all necessary steps had been taken previous to suing it out, with its present direction. There was no reason, consequently, for setting it aside. With regard to the second objection, that the defendant was not charged in execution, the defendant being already in custody, all that the coroner could do was to indorse the writ, and take it to the gaoler in whose custody the defendant was, and leave it with him. All, therefore, which was necessary on the part of the coroner, he had

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(a) Ante, vol. 1, p. 196. See *Deemer v. Brooker*, ante, vol. 3, p. 576, and post, p. 9.

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effected. The present rule must consequently be discharged.

The *Attorney General* and *Archbold*, in support of the rule, contended, that although there was no authority to shew the necessity for a recital in the writ of the sheriff's being interested, when it was directed to the coroner, yet it was proper that such a recital should be introduced, or the proceedings would appear inconsistent. The second objection might perhaps be admitted to have been answered. The third, however, must be considered as still unaffected. The defendant had never been charged in execution. Merely taking the writ directed to the coroner to the gaol of the sheriff, could not charge him in the custody of the sheriff. In order to charge him properly in execution, the coroner should have made out his warrant, and that should have been taken to the county gaol. This not having been done, the defendant was not charged in execution, and therefore was entitled to his discharge.

LITLEDALE, J. (a)—There was no necessity for stating on the writ of *ca. sa.* that the sheriff was interested, and therefore the writ was directed to the coroner. It is only necessary that there should be a suggestion of it on the record, and which suggestion may be entered at any time. But, it is said, that the defendant has not been legally charged in execution. At the time the writ of *ca. sa.* was issued, the defendant was already in the custody of the law. All that the coroner could do, therefore, was to indorse the writ, and take it to the county gaol. That had the effect of charging him on the writ. There could be no necessity for the coroner making out his warrant. He might execute the writ himself without making out his warrant, and that he had done as far as he could consi-

(a) Lord Denman, C. J., was absent.

tently with the situation of the defendant, who was already in custody. The present rule must therefore be discharged.

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PATTESON, J.—There is no irregularity here. The writ is directed to the coroner, which, in point of law, can only be done when the sheriff is interested. The fact of interest should be suggested on the record, and we must presume that it will be entered of record in due time. Then as to the point, that the defendant has not been charged in execution. How otherwise could he be so charged? The coroner could not take him into custody, the defendant being already in the sheriff's prison. It would consequently be useless to make out his warrant. The coroner has no gaol of his own, but the sheriff's gaol is his gaol. All that he could do, therefore, was to take the writ and deliver it to the gaoler of the county, by which means the defendant became charged in execution on the process. It is true, we have no direct evidence that the coroner did take the writ to the gaol after indorsing it, but in the absence of proof, why are we to presume that he did not do his duty?

WILLIAMS, J., concurred.

Rule discharged, without costs.

DEEMER v. BROOKER.

MILLER moved for a rule to shew cause why the defendant should not be discharged out of custody, on the ground that the plaintiff had not carried in the roll previous to issuing execution. The facts were that the plaintiff had obtained a verdict against the defendant at the

A defendant taken in execution cannot avail himself of the plaintiff not carrying in the judgment roll so as to obtain his discharge.

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last *Chelmsford Summer Assizes*, and on it signed judgment and issued execution. Previous to suing out his *ca. sa.*, he had not carried in the roll. This, it was submitted, he ought to have done previous to issuing his writ.

COLERIDGE, J.—The defendant cannot object to the plaintiff not having entered his proceedings on the roll, such entry being for the benefit of the latter. If the defendant wants to enter satisfaction on the roll, he may apply for that purpose. At present, there is no ground for discharging him out of custody.

Rule refused.

RICHARDSON v. FELL.

On a plea of payment, if that be the only one, the defendant is bound to begin.

MACGUIRE shewed cause against a rule *nisi* obtained by *Dowling*, for setting aside the verdict found in this case for the plaintiff, and entering a nonsuit. It was a cause tried before the sheriff of *Middlesex*, on a writ of trial. The declaration was for money lent, and contained only one count. The only plea was payment, on which the plaintiff took issue. The question was, whether the plaintiff or the defendant should begin. The under-sheriff was of opinion that the defendant having pleaded payment, he was bound to begin, and prove the payment. Not being prepared with any evidence for that purpose, the under-sheriff thought that the plaintiff was entitled to a verdict. It being contended, on the other hand, by the defendant, that the plaintiff ought to begin, evidence was given in support of his claim, so as to prevent the necessity of coming down a second time, if the Court above should be of opinion that the plaintiff ought to have begun. The evidence adduced was a simple "I O U three pounds," signed by the defendant, and

directed to the plaintiff. It was objected, that this was not sufficient to support a count for money lent, and there was no count on an account stated in the declaration. It was now contended, that, the defendant having pleaded payment, he had thereby admitted the existence of a debt, and, therefore, it was for him to begin, and prove payment.

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Dowling, contra, was heard in support of the rule.

COLERIDGE, J.—The defendant having pleaded payment, thereby admitted the existence of a debt; it was, therefore, his duty to discharge himself from that debt. He not having done so, the plaintiff was entitled to a verdict. The present rule must, therefore, be discharged. It is unnecessary to say any thing with respect to the second objection on the part of the defendant.

Rule discharged.

POOLE v. WATKINS.

ARCHBOLD shewed cause against a rule obtained by *Mansel*, for an attachment against an attorney, for not paying over a sum of 5*l.*, pursuant to a rule of Court and the Master's *allocatur*. The rule had required the client to pay over the sum mentioned in the rule, and, therefore, the application for an attachment had been made against the wrong person. An attorney was not bound to discharge the debt of his client.

If a rule of Court requires a client to pay a certain sum of money, an attachment cannot be obtained against his attorney for its nonpayment.

Mansel supported the rule.

COLERIDGE, J.—The rule requires the client, not the

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attorney, to pay this sum of money. The attachment, therefore, has been moved for against the wrong person. The rule, consequently, must be discharged, and with costs.

Rule discharged, with costs.

HARDBOTTLE v. CLARK.

If notice of country bail is given who are to justify pursuant to the old practice, the four days' notice required by 1 *Reg. Gen. T. T. 1 W.* 4, need not be given.

GASELEE opposed the bail in this case, on the ground that four days' notice of justification had not been given, pursuant to 1 *Reg. Gen. T. T. 1 Will. 4(a)*.

Dowling, in support of the bail, contended, that as the bail in the present case were country bail, who had justified under the old rules, there was no necessity to give any more than the ordinary two days' notice required by the practice antecedent to those rules.

COLERIDGE, J.—Sufficient notice has been given, pursuant to the old practice; and as the bail are to justify according to that practice, they may be allowed to justify.

Bail passed.

(a) *Ante*, vol. 1, p. 102.

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DENNEHEY v. RICHARDSON.

STEER shewed cause against a rule *nisi* obtained by **Butt** for judgment as in case of a nonsuit. Issue was joined in this cause in the last term, and notice of trial given for the third sittings in the same term. By the practice of the Court a plaintiff is not bound to take more than one step in a term. The plaintiff, therefore, had done all that could be required of him by joining issue; and if he had done no more, the defendant would not be in a condition to make this motion. But it appeared he had given notice of trial; still, as he had countermanded that notice in due time, the parties were in the same situation as if no such notice had been given. It had been held that a defendant was not entitled to costs of the day where there had been a countermand, nor could he be entitled to judgment as in case of a nonsuit under these circumstances.

Countermanding a notice of trial does not interfere with the defendant's right to obtain judgment as in case of a nonsuit, although issue has been joined in the same term as that in which notice is given.

Butt, in support of the rule, contended, that the countermand of notice, if made in due time, could only prevent the plaintiff having to pay the costs of the day.

COLERIDGE, J.—The effect of countermanding the notice of trial is only to save to the plaintiff the payment of the costs of the day. If it be according to the course and practice of the Court that the plaintiff should have gone on to trial pursuant to notice, the defendant is entitled to judgment as in case of a nonsuit.

The rule was afterwards discharged on the plaintiff giving a peremptory undertaking.

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WATKINS v. GILES.

If a defendant, by negotiation, prevents a plaintiff from proceeding to trial in due time after issue joined, he cannot obtain judgment as in case of a nonsuit on account of such delay.

HENRY shewed cause against a rule obtained by *Mellor* for judgment as in case of a nonsuit. The affidavit in opposition to the rule stated that issue had been joined on the 2nd *March*. On the 8th *March*, an offer was made by the defendant to refer the cause. From that time till the 12th *May* nothing was heard from him, and then he refused to proceed with the reference. In *Trinity* Term the present rule was obtained. Under these circumstances it was contended that the application was too soon.

Mellor was heard in support of the rule.

COLERIDGE, J.—I think the defendant has come too soon; the present rule must, therefore, be discharged with costs.

Rule discharged, with costs.

DOR d. RIGBY v. ROE.

Service on the administratrix of the last tenant in possession is not sufficient, unless it is shewn that she is the tenant in possession.

BUSBY moved for judgment against the casual ejector. The premises sought to be recovered were five houses. The service had been on the administratrix of the late tenant, but who did not reside on the premises, which were shut up. The affidavit did not shew the nature of the tenancy, nor describe the administratrix as tenant in possession.

COLERIDGE, J.—That is not a sufficient service. In the first place, the affidavit does not swear to a service on the tenant in possession, which is required by the practice of the Court; and secondly, this being real property, the presumption of law is, that it belongs to the heir, until it

is shewn that the last tenant had only a chattel interest in the premises, but which does not appear. If in fact the interest was only of a chattel nature, the affidavit might have been in the common form, describing the administratrix (not in her representative character,) as tenant in possession, notwithstanding she was not in the actual occupation of the premises.

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Rule refused.

Ex parte LOWE.

CROWDER moved for a rule for a *mandamus* to be directed "to the Precentor of the Cathedral Church of St. Peter in Exeter, and Official of the Dean and Chapter of the said Cathedral Church," to swear in the applicant as a churchwarden of the parish of *Topsham*, he having been regularly appointed. The parish was within that ecclesiastical jurisdiction. If the rule were granted, it would be absolute in the first instance, on the authority of an anonymous case, in 2 *Chit. Rep.* 254. There, the Court said, "As it is only to swear in, which does not confer any title, the rule may be absolute in the first instance."

The rule for a *mandamus* commanding the ecclesiastical authorities to swear in a churchwarden duly appointed is absolute in the first instance.

COLERIDGE, J.—You may have your rule absolute in the first instance.

Rule absolute in the first instance (a).

(a) *J. Henderson* obtained a similar rule in the course of the term, absolute in the first instance.

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TURNER v. UNWIN.

(Before the four Judges.)

Affidavits in answer to a rule enlarged from one term to another which requires the affidavits to be filed a certain time before the term, must in all cases, notwithstanding a contrary practice has prevailed, be filed within the time prescribed, unless the party is prevented filing them by inevitable accident.

WHITEHURST moved for a rule to shew cause why the affidavits in this case should not be read on shewing cause, although they had not been filed a week before term, as required by the terms of the enlarged rule. There was no affidavit of the reason of their not having been filed a week before the term, but the reason suggested was, that the attorney in the country was not aware that any strictness of practice existed as to the time when such affidavits should be filed. They were, however, filed three days before the term, and notice of that fact was given to the opposite side; and under these circumstances the practice of the Court was to permit them to be read, though not filed exactly at the time required. The ordinary course was, to obtain such a rule as that which was now prayed, and then when the rule came on to be discussed, the Court allowed the affidavits to be used.

WILLIAMS, J.—You may take a rule *nisi*.

Rule *nisi* granted.

M. D. Hill afterwards shewed cause against the original rule, and the rule *nisi* so obtained. He contended that the party not having filed the affidavits a week before term, according to the practice of the Court, they were not in a situation to read the affidavits so irregularly filed.

Whitehurst, contra, submitted that the only object of the practice was to allow the party, against whom it was sought to use the affidavits, an opportunity of examining their contents. Here, they had been filed three days before the term, and considerably more than a week of the

term had elapsed before the rule came on for discussion, on which the affidavits were to be used. Besides, notice had been given of their having been filed three days before the term, and therefore every possible advantage which could result from their being filed according to the practice of the Court had been secured to the opposite party.

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Lord DENMAN, C. J.—We think it is better to adhere to the strict words of the rule (*R. M. 36 Geo. 3*), and to determine that the affidavits which have not been filed in due time cannot be used except in the case provided for by the rule itself. We have had several applications of this sort during this term; much time is consumed in discussing such questions, and though a contrary practice has existed, we have determined for the future to adhere strictly to the rule.

Whitchurst then argued that although it might be very desirable to adhere strictly to the letter of the rule for the future, yet as the contrary practice was admitted to have existed, and those affidavits were not filed in time in consequence of that practice, he ought to be permitted in this case to use them; but

The Court refused to permit the affidavits to be used.

The rule was afterwards discharged on the state of facts presented by the affidavits on which the rule had originally been obtained.

Rule discharged.

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Ex parte Cross.

A notice by an attorney on the last day of one term to apply for re-admission in the next, is not sufficient, although the notice remains up throughout the vacation.

STEER moved, on the second day of term, to re-admit an attorney. The affidavit on which he moved stated, that the usual notices had been put up on the last day of the last term, stating the applicant's intention to apply for re-admission on the first day of the present term. Those notices had remained up duration the whole vacation. There was no reason for taking the case out of the ordinary rule requiring a term's notice to be given previous to making the application to be re-admitted; and therefore, unless the Court thought the continuance of the notices during the vacation was sufficient, the present application could not be granted.

COLERIDGE, J.—In all cases a term's notice of an application to be re-admitted must be given, unless some special circumstances exist to take the case out of that rule. He may, however, continue his notices from the first day of this term until the last day of it, as it appears they were put up on the last day of *Easter* term.

Admission refused.

In re **ELIZABETH MASTERS, JAMES MASTERS, and
GEORGE HARRIS MASTERS.**

It is no answer to an application to tax an attorney's bill that an agreement has been made that the attorney shall receive one half the proceeds of a suit carried on at the instance of the client.

CROWDER showed cause against a rule *nisi* obtained by *W. H. Watson*, requiring Mr. *Joseph Drewe* to shew cause why he should not deliver an account of all monies received on account of the said *Elizabeth Masters, James Masters, and George Harris Masters*; and also why he should not deliver a bill of costs in a cause of *Hasell, executor, &c. v. Welsh*, and in all other matters in which he

had been concerned for the said Messrs. *Masters*, and why the same should not be referred to the Master to be taxed, and why he should not give credit for all sums of money by him received on their account, and pay over all such sums as might be found due to them. The facts, as they appeared in the affidavits, were these. In consequence of information received from Mr. *Drewe* by the applicants, that a Mr. *Richard Welsh* had in his possession a certain sum of money in which they were interested, and to which they were entitled, it was agreed that he should commence an action against Mr. *Welsh* for the recovery of that sum, and that in case of his success, he should receive one half the proceeds of the action; but if he should not succeed, he was to charge the applicants nothing for costs. Mr. *Drewe* accordingly sued out a writ in the name of Mr. *Hasell*, the executor of the will under which the claim was made, an indemnity against costs having been given to him. The defendant afterwards gave a cognovit for the debt and costs. The debt amounted to 88*l*. Applications were then made to Mr. *Drewe* for the proceeds of the action, and for his bill of costs. He then insisted upon giving no more than 44*l*., being only one-half the proceeds of the action, he retaining the other pursuant to the agreement, and refused to deliver his bill; for, as he said, if it were made out, nothing would be coming to the applicants. The question was, under these circumstances, whether the Court would interfere in the manner prayed by the rule. The attorney in the present case could not be considered as the attorney of the persons who now applied, for the action had been brought in the name of Mr. *Hasell*. That gentleman, therefore, must be considered as the client, and therefore only accountable to him for the proceeds of the action. So far, therefore, as these persons were concerned, the relation of attorney and client was not made out, and therefore the Court could not interfere. Such conduct on the part of an attorney as was disclosed by the affidavits

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might not be precisely regular; but it was very hard upon Mr. *Drewe*, now that he had conducted the case to a successful issue, to be deprived of that advantage which the parties themselves had agreed he should receive.

W. H. Watson, in support of the rule, submitted that the Court would not tolerate such conduct in an attorney as that which the affidavits disclosed. Such an agreement as that set up by him could not be binding on the client, nor was it binding on the Master in taxing the bill. He cited *Drax v. Scroupe* (a), where it was held that a special agreement between an attorney and his client as to the amount of the charges of the former was not binding on the Master on taxation.

COLERIDGE, J.—The application in this case proceeds on two grounds: the first is, that the applicant is the client of the attorney Mr. *Drewe*, and therefore he requires him to deliver his bill, so that it may undergo taxation; the second is, that a sum of money having come improperly into his hands, as an officer of the Court, he is required to give an account of it. As to the first ground, it is essential for the person applying to shew that the relation of attorney and client existed. The name of the case unexplained does not shew that the applicant was Mr. *Drewe's* client. But I think, on examining the facts, the relation appears to have existed. In the case of *Hasell v. Welsh* it was necessary to use Mr. *Hasell's* name, but that was under an indemnity in the action which was brought for the benefit of the applicant. Then the case becomes that of the ordinary motion for taxing an attorney's bill. What is the defence to the application? The attorney sets up an agreement between him and his client. But if that agreement does not exist, or cannot be enforced, it is a

(a) Ante, vol. 2, p. 69.

matter of course to refer the bill. It is incumbent on the attorney to shew that such an agreement exists as the Court can uphold, in order to prevent taxation. Now it is impossible to say that the agreement here stated, which is substantially champerty, can be upheld, so as to prevent the attorney from being bound to submit his bill for taxation. The agreement is, that he shall have one half the proceeds of the action. That is an agreement which the Court cannot sanction. I think, therefore, in that point of view, the present rule must be made absolute. It is unnecessary to inquire into the latter part of the application, as the first point is sufficient. It is immaterial who made the first application, that is, whether it was by the attorney to the client or by the client to the attorney. If the *Masters* had come here to enforce an agreement, or to be set free from one, it would be a different thing; but they come here in the ordinary way. The bill will therefore go before the Master; and, if he finds it necessary, he will obtain any instructions he requires from the officers of the Court of *Chancery*, with respect to any business which may appear to have been done in equity.

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Rule absolute accordingly.

—♦—
HOWARD v. GROOM.

HUMFREY shewed cause against a rule obtained by *Butt* requiring Mr. *George Arthur Dye*, the defendant's late attorney, to shew cause why it should not be referred to the Master to tax the costs of the taxation of his bill of costs, pursuant to the order of the Honourable Mr. Justice

The Court has no direct power to refer an attorney's bill for taxation except under the authority of the 2 Geo. 2, c. 23.

An attorney does not waive his right to object to the jurisdiction of the Court directly to refer his bill for taxation by attending its taxation before the Master, on which, according to the statute, he would be liable to pay the costs of taxation, the client not having given the undertaking required by the statute to pay what should be found due.

He will, however, be liable to refund what should be found overpaid on such taxation.

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Littledale, dated the thirtieth day of *December* last past; and why he should not pay the amount thereof, together with 1*l.* 10*s.* 2*d.*, found to be due from him to the defendant; and why he should not deliver to the said defendant all deeds, books, papers, and writings belonging to the said defendant in his possession, and particularly the mortgage deed in the said bill of costs mentioned; and why he should not pay the costs of this application to be taxed by the Master. The facts, with respect to which there was no dispute in the affidavits, were these. The defendant *Groom* was some time since a prisoner for debt in *Norwich* castle, at the suit of the plaintiff. Mr. *Dye*, the attorney against whom the present application was made, became acquainted with the defendant, and acted as his attorney in various matters. In the course of these transactions a debt to the amount of 36*l.* 8*s.* 2*d.* was said to be incurred. An order was then obtained from Mr. Justice *Littledale* for the taxation of this bill, and Mr. *Dye* attended before the Master for that purpose. On taxation, the Master taxed off a sum of 15*l.* 8*s.* 4*d.*, and allowed a sum of 22*l.* 10*s.*, which had been received on account from the defendant: thus leaving a balance of 1*l.* 10*s.* 2*d.* to be refunded by Mr. *Dye*; and also taxing off more than one-sixth from the bill.

First, as to referring it to the Master to tax the costs of taxation to the defendant, the latter was not in a position to demand them: he not having complied with the conditions of sect. 23 of 2 *Geo.* 2, c. 23, in giving the undertaking to pay what should appear to be due on taxation. Unless such undertaking had been given, the defendant had not brought himself within the provisions of the act, and was therefore not entitled to obtain the benefit, which resulted solely from the act, of the costs of taxation. He cited *Harrison v. Ward* (a), the marginal note of which was,

(a) Ante, vol. 3, p. 541.

that "an attachment cannot be obtained for non-payment of costs, pursuant to the Master's *allocatur*, if there was no undertaking in the Judge's order for taxation to pay what should be found due." Then, as to the second branch of the rule, which required the sum of 1*l.* 10*s.* 2*d.* to be paid over to the defendant; as the amount of that sum depended on the taxation before the Master, and that taxation was unauthorized, the provisions of the statute not having been complied with, the defendant was also not entitled to demand that sum. The present rule ought therefore to be discharged. As to the mortgage deed and papers, it is not shewn that they were demanded, or what papers the attorney has in his possession.

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Butt, in support of the rule, contended, that the case of *Harrison v. Ward* was distinguishable from the present. That was an application for an attachment; and although the Court was of opinion that the attorney might resist an application for an attachment, it did not therefore follow that the Court would not interfere in the way required by the present rule. To obtain an attachment, it was of course necessary that an order should have been made in conformity with the terms of the statute. But it was not necessary that such an order should be made for the purpose of referring it to the Master to tax these costs, because the Court might make such an order by its common law jurisdiction over its own officers.

COLERIDGE, J.—In my opinion the Court has no original power to send an attorney's bill for taxation, except in pursuance of the statute. It can only refer his bill independent of the statute when that reference is incidental to an inquiry into the attorney's conduct.

Butt.—The attorney had, however, waived any objection

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to the want of jurisdiction, because he had consented to the order, and had attended the taxation before the Master, and thus submitted himself to the authority of the Court. He was, therefore, estopped from taking such an objection. Besides, the statute does not direct that the order for the taxation of an attorney's bill should be made in any particular form; and in the present case it was made in the terms agreed on by the parties themselves. If, then, the learned Judge, in making the order, had no jurisdiction except by the statute, this must be taken to have been an order well made upon the authority of the statute; and it would be contrary to law and common sense to say, that after parties had submitted themselves to a particular jurisdiction, and taken advantage of it, they should be allowed to turn round, and question the authority which they had set in motion. With respect to the *11. 10s. 2d.*, the Master's *allocatur* orders that sum to be refunded, and the Court will order the attorney to repay the money. With regard to the mortgage deed, it certainly does not appear that it was demanded by the client; but all the deeds, papers, and writings, generally, were demanded of the attorney, and he was bound to deliver them up.

COLERIDGE, J.—The first question is, whether it ought to be referred to the Master to tax the defendant his costs of taxation. As to that, I apprehend the power of the Court to tax such costs is only given by the statute. If you look at the words of *2 Geo. 2, c. 23, s. 23*, you will see the conditions introduced on which such a taxation is to take place, and without a compliance with which the Court cannot direct them to be taxed. The attorney is obliged to deliver his bill, and on that delivery the client has an option to go before the Master and have it taxed; but then that is allowed only upon the performance on his part of certain conditions. One is, that he shall undertake to pay what shall appear to be due on taxation. If he does not

enter into this undertaking, he is not on an equal footing with the attorney. The case of *Harrison v. Ward* is distinguishable from the present. That was an application to obtain an attachment, and of course the party could not be liable to such a proceeding unless he had given an undertaking which he had afterwards failed to fulfil. Here the Court is proceeding under a power given by the statute, which is clogged by a certain condition. That condition is the giving an undertaking to pay what shall appear to be due on taxation, and that condition has not been fulfilled. The Court, therefore, has not any power to grant this part of the rule. But it is said that the attorney consented to the order, attended before the Master on the taxation, and therefore he cannot now dispute the authority of the Court to tax the costs occasioned by the taxation of the bill. But I think that by so acting the attorney did not admit the jurisdiction of the Court to the extent contended for. He is not, therefore, too late to insist that the defendant is not in a situation to have the costs of taxation referred to the Master, as the condition on which the taxation itself could be directed by the Court has not been complied with. The rule must therefore be discharged as to this part. Next, as to refunding the sum of 1*l.* 10*s.* 2*d.*, I think the proceeding before the Master, in the result of which he was ordered to pay this sum, was perfectly authorized. The attorney, therefore, has no defence against that order. If he had any objection to it he should have come to review the taxation of the Master, or the proceedings thereon. As to the mortgage deed, I do not think the defendant has shewn enough to entitle himself to it; but as to the deeds, papers, and writings generally, I think he is entitled to require them to be delivered up.

The rule will therefore be discharged as to referring it to the Master to tax the costs of taxation and to deliver up the mortgage deed, and absolute as to refunding the

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sum overpaid and the delivering up of all deeds, papers, and writings, without costs on either side.

Rule accordingly.

BOTTOMLEY v. BELCHAMBER.

If facts are stated in support of an application for an attachment, from which it may be presumed that the person sought to be served has received notice of the contents of the rule and *allocatur*, and of the demand thereon, and on shewing cause against the rule such knowledge is not denied, the Court will direct the attachment to issue.

The residence of an attorney's clerk need not be given in an affidavit made by him jointly with his master, in which the residence of the latter is stated.

J. J. WILLIAMS shewed cause against a rule obtained by *Comyn* for an attachment for non-payment of money and costs pursuant to the Master's *allocatur*. He objected, in the first instance, to the mode in which the second deponent in the joint affidavit on which the rule was obtained, described himself. The commencement of the affidavit was—"Charles Frederick Collins, of *Spital Square*, in the county of *Middlesex*, attorney to the above-named defendant, and *Robert Mason*, his clerk, severally make oath and say." The description of the clerk's residence was here totally omitted; although his master's residence was given, that was not sufficient according to the practice of the Court.

Comyn, contra, contended, that where the attorney's own residence was given, the residence of the clerk need not be given if he joined in an affidavit with his master.

COLERIDGE, J., (after consulting with the Master), was of opinion that the description was sufficient.

J. J. Williams then proceeded to shew cause on the merits.—The affidavit on which the rule was obtained, stated that applications had been made on the 20th *May*, and on several succeeding days, at the office of *Nathaniel Bowden*, the plaintiff's attorney, No. 3, *Quality Court, Chancery Lane*, for the purpose of demanding payment of the costs mentioned in the rule and *allocatur*, and the

office was found closed every time, and the only information deponent could obtain was from the laundress having care of the offices, who said she knew nothing of Mr. *Bowden*, but that his agent, Mr. *Hallett*, was sometimes to be seen there, yet at what particular time she could not tell; and deponent having obtained information that Mr. *Bowden* had been sometimes seen at a public house, called the *Britannia*, near the *King's Bench* prison, he attended there on *Saturday* evening, the 23rd of *May* last, and waited in the neighbourhood for a considerable time, without being able to see him, and that he also attended at the same place on the morning of *Friday*, the 29th *May*, and after waiting a considerable time, he saw Mr. *Bowden* pass the said public house in company with another person, whereupon deponent ran towards him, which Mr. *Bowden* perceiving, ran away, and before deponent could reach him he entered a shop and escaped, as this deponent is informed and believes, by a back entrance; and that he has made the most diligent inquiries after Mr. *Bowden*, of various persons who act as his agents, all of whom state their utter ignorance where he may be found, and deponent believes and has no doubt he is in concealment to evade this and other matters. That deponent attended on the 20th, 23rd, and 27th of *May* last, at various places, for the purpose of seeing Mr. *Bowden*, but without effect; and he attended twice on *Friday* the 29th *May* last, at his office in *Quality Court*, but the office was closed, and he was unable to gain any information when or where he might be seen. He applied there again on *Saturday*, the 30th *May* last, and finding the said office still shut up, he put a true copy of the said rule and *allocatur* through the door into the letter-box. He again called at the said office on *Monday*, the 1st *June* instant, when he saw a person whom he believes to be Mr. *Hallett*, and who told deponent he was Mr. *Bowden's* agent, but that Mr. *Bowden* was not there, nor could he say when he would be. The

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deponent then urged him to name some time within a week when Mr. Bowden could be seen; but he told him he could not fix any time or say when or where deponent could see him: whereupon he delivered to the said person another true copy of the rule and *allocatur*, and demanded of him payment of the said costs, but he did not pay the same or any part thereof; and deponent at the same time delivered to this person a true copy of the following notice, namely, "In the *King's Bench*, between *Eneas Bottomley*, plaintiff, and *James Belchamber*, defendant. You having hitherto eluded my attempts to demand of you personally the taxed costs herein, amounting to 8*l.* 5*s.*, I hereby give you notice, that I shall attend at your office, No. 3, *Quality Court, Chancery Lane*, to-morrow at half-past twelve o'clock at noon, for the purpose of seeing you and demanding the same; and if I do not then see you or receive the amount, I shall on *Wednesday* apply to the Court on a special affidavit of facts, for leave to issue an attachment against you without a personal demand of the money. A copy of the rule and *allocatur* was left at your office on *Saturday* last." This notice was directed to Mr. *Nathaniel Bowden*, plaintiff's attorney, and signed "*Chas. F. Collins*, defendant's attorney. 1st *June*, 1835."

The affidavit then went on to state, that deponent further saith, that he attended at Mr. *Bowden's* office at the time mentioned in the said notice, but the office was shut up, and he has been unable to see Mr. *Bowden*, or make any further demand of the said costs; and that deponent hath made diligent inquiry after the said plaintiff, *Eneas Bottomley*, but has been unable to discover his place of abode or where he could be found, and believes that it will be quite impracticable to make any demand on him.

No one of the statements contained in this affidavit shewed that personal service of the rule and *allocatur* had been effected. In point of practice now, personal service was always required in order to obtain an attachment.

COLERIDGE, J.—Is there any denial on your part, that none of these letters and notices came to your knowledge?

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J. J. Williams admitted that his affidavits contained no such denial.

COLERIDGE, J.—If none of them have come to the knowledge of the person sought to be served, nothing would be easier than to deny it. If he has received them, he has had sufficient service.

—◆—
 OUGHEGAN v. PARISH.

WIGHTMAN shewed cause against a rule *nisi*, obtained by *J. Jervis*, for issuing a commission for the examination of witnesses on interrogatories at *Buenos Ayres*, under the 1 Will. 4, c. 22, s. 4 (a). The only objection to the application was, that certain terms should be engrafted upon it. The terms were that certain costs in the Court of *Chancery*, consequent on an unsuccessful suit relative to the same subject-matter, should be paid or secured previous to the commission issuing.

The Court will not stay the issuing of a commission to examine witnesses abroad on the ground of the plaintiff being indebted to the defendant for certain costs in equity.

John Jervis, in support of the rule, contended, that this Court could take no notice of the costs incurred by the plaintiff in *Chancery*. The suit has been dismissed with costs, and the defendant had his proper remedy for them.

COLERIDGE, J.—I cannot prevent or stay the commission for such a reason as that which is suggested by the defendant.

Rule absolute.

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REX v. STRETCH.

(Before the four Judges.)

An application for an attachment for disobedience to a *subpoena* must in all cases be made promptly, and therefore a rule for an attachment for not obeying a *subpoena* to attend on the trial of an indictment on the 11th of December was discharged, because it had not been moved for until the 23rd April following.

Semble, that it is not necessary that a witness should be called on his *subpoena* in order to bring him into contempt.

Affidavits in answer to an application for an attachment in a criminal case should not be entitled in it unless the record is in the *King's Bench*, but should be entitled in the Court only.

W. CLARKSON shewed cause against a rule *nisi*, obtained by *G. T. White*, for an attachment against a person named *Auriol*, for not attending, pursuant to a Crown Office *subpoena*, the *Middlesex Sessions*, on the trial of the defendant, who was charged with keeping a gambling house. The affidavits on which the application was made appeared to have been sworn on the 25th and 28th of April; the trial, for non-attendance at which the attachment had been moved for, having taken place at the *Middlesex Sessions*, on the 11th December last. In the first place, he objected to the application on the ground of its being too late. The person at whose instance the rule had been obtained might certainly have come earlier than the 25th April. He referred to — *v. St. Leger (a)*, where it was ruled, that “the motion for an attachment, against a person subpoenaed as a witness, for not attending, should, as in other cases of contempt, be brought forward as soon as possible; and therefore the Court refused an attachment in *Hilary Term* for non-attendance at the preceding *Summer Assizes*, and left the party to his civil remedy.” In the present case, the prosecutor might have applied in *Hilary Term*. Next, he relied on his own affidavits as shewing that *Auriol* was not called by the officer of the Court on his *subpoena*; and he cited, in support of this objection, *Rex v. Stretch (b)*.

G. T. White, in support of the rule, objected that the affidavits on which cause was shewn were improperly entitled. They were entitled “In the *King's Bench*,” and not “*The King v. Stretch*,” as they ought to be.

(a) 2 Tidd, Prac. p. 807, ed. 9.

(b) Ante, vol. 3, p. 368.

Lord DENMAN, C. J., was of opinion, that as the record in the prosecution of "*The King v. Stretch*" was not in Court, the affidavits were properly entitled.

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G. T. White, in support of the rule, contended, that the delay in applying for the attachment was no answer to the application, where the contempt had been incurred by disobeying a *subpœna* to attend on the trial of an indictment. On the question whether it was necessary that the witness should be called on his *subpœna*, he referred to *Dixon v. Lee* (a), where the full Court of *Exchequer* held, that upon a motion to attach a witness for disobedience to a *subpœna*, in not attending at the trial, an affidavit that she was called three times in open Court is sufficient, without alleging that she was called upon the *subpœna*. He also cited Mr. Justice *Holroyd's* judgment in *Barrow v. Humphreys* (b). The case of *Rex v. Stretch* might have been well decided in the way it was on other grounds than that of the defendant not having been called on his *subpœna*, as there was in that case a sufficient answer on the merits.

Lord DENMAN, C. J.—In the present case, it is not necessary to enter into the disputed question of practice as to the mode of calling the witnesses. We have quite a sufficient ground for refusing the attachment on account of the length of time which has elapsed since the alleged contempt was committed. It seems to me, that parties who seek to enforce the summary remedy of attachment should come promptly after the commission of the supposed contempt. If the application be made early, the party may be able to give an adequate reason for not having obeyed the exigency of the writ, but which he would not be able to do where unreasonable delay takes

(a) Ante, vol. 3, p. 259.

(b) 3 B. & Ald. 598.

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place. For this reason, I think the application for an attachment should be made at the earliest opportunity; and so great a delay having taken place in the present instance, I am of opinion that the present rule ought to be discharged.

LITLEDALE, J.—I think the delay on the part of the prosecutor is quite a sufficient reason for discharging the present rule. The application ought to have been made in *Hilary Term*.

PATTESON, J.—I think the case of *Barrow v. Humphreys* (a) is clearly distinguishable from the present. The case of *Dixon v. Lee* in the *Exchequer* was before that of *Rex v. Stretch*. If that had been brought to my attention at the time I decided *Rex v. Stretch*, I certainly should not have expressed so strong an opinion as to the necessity of the defendant being called on his *subpœna*. I think the delay in the present case is a sufficient ground for discharging the present rule.

WILLIAMS, J.—The application was too late.

Rule discharged without costs.

(a) 3 B. & Ald. 598.

YOUDE v. YOUDE.

In an action on a specialty, an application to change the venue cannot be made until after issue joined.

J. BAYLEY shewed cause against a rule obtained by *Tyrwhit* for changing the venue from *Middlesex* to *Denbigh*. It was an action on an annuity bond, and the defendant had pleaded three pleas:—*First, non est factum; secondly, payment; thirdly, a set-off*. He objected in the first instance that the declaration being on a specialty, the

application was premature. It ought not to have been made until issue was joined, as until then, it could not appear what were the real questions which the parties would go to the assizes for the purpose of trying. What the ultimate matter in dispute would be between them must depend on the replication. In the case of *Weatherby v. Goring* (a), the Court held, that before issue joined an application to change the venue in an action on a specialty could not be entertained. That was an action of covenant on an indenture of apprenticeship. There, the Court said, "the motion was made too soon. Until issue has been joined, the Court cannot tell whether the defendant intends to set up any defence to the action, and he cannot be entitled to change the venue in an action on a specialty, unless it appears clearly that he will have some witnesses to examine on the trial of the cause." In *Bohrs v. Sessions* (b), in covenant on a farming lease of land in *Essex* for breaches of covenants relating to the cultivation of the land, the Court refused to allow the venue to be changed from *Middlesex* to *Essex* before plea pleaded. He also cited *Parmeter and Another v. Otway* (c), which was to the same effect.

Tyrwhitt, in support of the rule, contended, that the case of *Weatherby v. Goring* was not in its facts like the present. There, the application to change the venue was made before plea. In the two latter cases cited on the other side, the Court had only determined, that the application could not be made before plea pleaded. Under these circumstances, the question now arising before the Court had not as yet been determined. After plea pleaded, the application could not be considered as too early, as the Court could judge from the nature of the pleas whether

(a) 5 Dowl. & Ry. 441; 3 B. & C. 552.

(b) Ante, vol. 2, p. 699.

(c) Ante, vol. 3, p. 66.

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the defendant really intended from the consideration of their nature to call witnesses. There could be no necessity to wait for the replication, as it would be clear from the pleas themselves what the replication must be.

COLERIDGE, J.—I shall decide this case on the authority of *Weatherby v. Goring*. It was decided in that case that the application ought not to be made till after issue joined; and the subsequent decisions which have been cited are not inconsistent with the judgment in that case. It is true there may be certain cases, in which we can say almost with certainty what the issue between the parties will ultimately be after plea pleaded. But, in laying down a general rule, it is better to decide according to what is generally likely to happen than to what may occasionally occur, and in general we cannot tell what the replication may be. The safer rule is to wait until issue is joined, before an application to change the venue is made. The present rule must, therefore, be discharged, but without costs, as, under the circumstances, there were fair grounds for making the motion.

Rule discharged, without costs.

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Drake and Others v. HARDING.

An affidavit of debt claiming interest, must shew that it accrued pursuant to agreement.

An affidavit of debt, bad as to part, is insufficient

HOGGINS shewed cause against a rule obtained by *Barstow*, for discharging the defendant out of custody, on the ground of a defect in the affidavit of debt. It was in these terms:—" *John Gribble*, of *Barnstaple*, in the county of *Devon*, banker, maketh oath and saith, that *Philip Harding* is justly and truly indebted unto this deponent, and to *Zachary Hammett Drake* and *John Marshall*, in the sum of one hundred and twelve pounds, for principal and interest on a several and joint promissory note for one hundred pounds, bearing date the thirteenth day of *February*, one thousand eight hundred and thirty-

three, drawn by the said *Philip Harding* and *Maria Harding*, payable to the deponent and to *Zachary Hammett Drake* and *John Marshall*, with lawful interest for the same, on demand. And this deponent further maketh oath and saith, that the said *Philip Harding* is justly and truly indebted unto this deponent and to the said *Zachary Hammett Drake* and *John Marshall* in the further sum of two hundred and fifty-nine pounds for money lent and advanced, and paid, laid out, and expended by this deponent, and by the said *Zachary Hammett Drake* and *John Marshall*, to and for the use of the said *Philip Harding*, and at his request, and for money due and payable from the said *Philip Harding* to the deponent and to the said *Zachary Hammett Drake* and *John Marshall*, for interest upon and for the forbearance of divers large sums of money due and payable for the said *Philip Harding* to this deponent and the said *Zachary Hammett Drake* and *John Marshall*, and by this deponent and the said *Zachary Hammett Drake* and *John Marshall* forborne for divers long spaces of time now elapsed, at the request of the said *Philip Harding*."

The objection to the affidavit was, that the claim to interest in the second branch of the affidavit was not set forth with sufficient certainty. It was, however, contended that it was stated with as much certainty as the nature of the claim required. The claim being for interest generally, it must be presumed to be legal interest. The allegation here was as exact as a count in a declaration. He cited *White v. Sowerby* (a), the marginal note of which was, that "an affidavit of debt claiming interest is sufficient, though it neither states the amount of the principal nor the time when it began to run." That case was exactly in point, and decisive that the present affidavit was sufficient. The present rule ought, therefore, to be discharged.

(a) Ante, vol. 3, p. 584.

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Barstow, in support of the rule, contended that in order to entitle a plaintiff to hold a defendant to bail, he ought to shew with perfect certainty what was the foundation of his claim; and should leave nothing to intendment. But here, without intendment, the claim was not set forth with certainty. It had long been decided that a defendant was not liable to be arrested for interest where it accrued merely by way of damages. He could only be held to bail for interest where it accrued in pursuance of an agreement. But according to the language of this affidavit, the interest claimed by the plaintiff might be interest accruing due by way of damages. It might therefore be sought by this affidavit to hold a defendant to bail for a debt not properly, in point of law, the subject of arrest. There was no doubt that the decision referred to was a correct report of Mr. Justice *Williams's* judgment; but as it did not appear that the cases on the subject had been fully laid before his Lordship, the Court would not be inclined to attach the same weight to that determination, which in all other cases the decisions of that learned Judge carried with them. If it appeared in the present case that the interest had been agreed to be paid by the defendant, the case might have been different. He cited *Callum v. Leeson (a)*, where it was decided by the full Court of *Exchequer*, that an affidavit of debt for money lent and interest, without shewing how the interest accrued, is bad. Had this case been brought to the attention of Mr. Justice *Williams*, his decision would no doubt have been different. The affidavit being bad as to part, was bad as to the whole (b).

COLERIDGE, J.—The principle is, that a person may be held to bail for a debt, but not for unliquidated damages. This principle has been most frequently discussed on

(a) *Ante*, vol. 2, p. 381. (b) *Baker v. Wells*, *ante*, vol. 1, p. 631.

questions relating to interest. The only question is, whether interest appears to have been reserved by special contract; but when I read these words, I conclude it is claimed as damages only. The words are merely "for the forbearance of divers large sums of money due and payable," &c. There is nothing about any agreement to pay interest. It might be for the jury to infer from the circumstances of the case, that interest was expressly agreed to be paid, but an affidavit to hold to bail should state it more clearly. I must decide on this case as it comes before me, though I feel the difficulty arising from the case of *White v. Sowerby*. In that case, the previous case of *Callum v. Leeson* was not brought before the attention of the Court. There is no doubt that part of the affidavit being bad, the whole is bad.

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Rule absolute.

WILKINSON v. TIME.

MILNER shewed cause against a rule *nisi*, obtained by *Wortley*, for entering up judgment and issuing execution for the sum of 1000*l.*, unless the defendant would consent to the time for making the award in this case being enlarged. The cause, which was an action of trespass, had been referred by an order of *Nisi Prius*, in which power was given to the arbitrator to enlarge the time for making his award. Unfortunately, the arbitrator allowed the original time, within which the award was to have been made, to elapse without enlarging the time. The defendant's attorney then refused his consent to any enlargement. It was now sought to enter up judgment for the full amount of 1000*l.*, for which the verdict had been taken, subject to the reference. Such a rule as the

Where, in an action of trespass, the time for making an award pursuant to an order of *Nisi Prius* expires before the award is made, and the arbitrator has not enlarged the time, as empowered by the order, the Court will under certain circumstances direct judgment to be signed and execution issued for the sum for which the jury find, subject to the re-

ference, unless the enlargement is consented to.

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present, however, could only be granted in actions for the recovery of a debt and not in an action like the present, where the question was as to taking water from a particular watercourse. The case of *Taylor v. Gregory* (a), where the Court had interfered, the demand was of money. In the case of *Doe d. Fisher v. Saunders* (b) the Court refused to interfere, it appearing that the plaintiff's attorney had been guilty of negligence in obtaining the order of *Nisi Prius*. In *Hall v. Phillips* (c) the marginal note was that "when a verdict is taken with damages subject to the award of an arbitrator, if the arbitrator omit to make his award within the specified time, the Court will send the cause down to a new trial."

COLERIDGE, J.—I do not think it is necessary to lay down a rule that the Court will interfere in all instances. There is no dispute that the Court has the power to direct judgment and execution to issue for the full amount of the verdict, unless the defendant will consent to the time for making the award being enlarged. The only question is, whether in this particular case it will be right so to interfere. It is not suggested that the reference was not considered as beneficial at the time the cause was taken down to the assizes. That which was beneficial then might be considered beneficial if the Court should award a new trial, and then the same course would have to be pursued. It is not suggested that any thing objectionable exists on the part of the arbitrator. I think, therefore, the rule ought to be absolute. It will be that judgment be entered up and execution issued for the sum of 1000*l.* unless the defendant consents to the enlargement of the time for making the award.

Rule absolute accordingly.

(a) 2 B. & Ad. 774.

(b) 3 B. & Ad. 783.

(c) 9 Bing. 89; 2 Moo. & Sc. 167.

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HARRISON v. WARD.

MAULE and *Petersdorff* shewed cause against a rule nisi calling on *William Turner*, the defendant's late attorney, to shew cause why the several sums of 30*l.* 15*s.* and 10*l.* 13*s.* 6*d.*, items in his bills of costs delivered to the defendant, should not be struck out of such bills and inserted in the cash account thereto, and why the rule made in this cause on the 29th of *April* should not be discharged, and why he should not pay to the defendant the costs of the taxation of the said bills, and also the costs of the application, to be taxed by the Master. From the affidavits on both sides these facts appeared:—Bills to the amount of 49*l.* 18*s.* 4*d.* were sent in by Mr. *Turner* to his client. The usual order for taxation was obtained from Mr. Justice *Littledale*, and on taxation a sum of 80*l.* 16*s.* 3*d.* was taken off. A rule for reviewing this taxation was obtained, and discharged with costs. A Judge's order was then made for giving the attorney, Mr. *Turner*, the costs of taxation. They were accordingly taxed, and an attachment issued for their amount. The present rule was then moved for on the part of the defendant, and the object of it was, that by removing certain sums mentioned in it from the bill, more than a sixth would be taken off the remainder, and thus the client would become entitled to the costs of taxation, and of course the proceedings on the attachment stayed. The ground of the application was, that in the bill the two sums in question were introduced as disbursements, although they were specific payments, over the amount of which the attorney had no control; while at the same time, it appeared in the cash account annexed to the bill, that a sum of 59*l.* 12*s.* had been received by him. It was difficult to conceive on what ground the introduction of those two sums was objectionable. If the sum of 59*l.* 12*s.* had been given to the at-

Where a rule for the review of the Master's taxation of an attorney's bill has been disposed of, the Court will not afterwards entertain a motion impugning the bill on the ground of certain charges having been improperly introduced into it instead of the cash account.

An attorney has a right to introduce into his bill disbursements made by him for his client, although he has no discretion as to their amount, if there is no specific appropriation of money paid by his client to him to such disbursements.

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torney with directions to him to apply it to a specific purpose without his being allowed to exercise any discretion on the subject, the introduction of the application of that sum as a disbursement would be objectionable. In *Wool-lison v. Hodgson* (a) it was held, that an attorney employed to defend an action, and receiving from his client the debt and costs for the purpose of being paid over to the plaintiff, is not entitled to make that sum an item in his bill so as to increase the amount of it. But here, there was nothing to shew, that any specific payment had been made for any specific purpose. The present did not come within the principle of that case. It was more like the case of *Taylor v. Shackleton*, referred to by Mr. Baron Bolland in his judgment in that case. His Lordship said, "There was a case in the *Common Pleas*, of *Taylor v. Shackleton*, where the attorney had received 65*l.* to pay counsel's fees at the assizes at *York*, and it was held that that sum was properly made an item in the bill; but I thought there was a distinction between the cases; here the debt and costs were a sum specifically received and paid." The mere fact of a sum being paid by the client to his attorney does not interfere with the taxability of the items in which that sum may be disbursed. In *Franklin v. Featherstonhaugh* (b), the Court held that an attorney is authorized to insert in his bill of costs the amount paid to a proctor employed by him for his client; and in considering whether more than one sixth has been taken off, the entire amount of the bill must be taken inclusively of such proctor's bill. Again, in *Hays v. Trotter* (c), it was decided that a defendant's attorney's bill having been delivered to his client, and more than a sixth taxed off, the attorney could not afterwards alter that proportion by adding on both sides of the account a sum received by him from his client, and paid into Court. In that case the Court would not allow an attorney to protect himself

(a) Ante, vol. 2, p. 360.

(b) 3 Nev. & Man. 779.

(c) 3 Nev. & Man. 174.

from paying the costs of taxation by introducing a sum directed by his client to be applied to a particular purpose into his bill. So, here the Court would not allow a client to protect himself from paying the costs of taxation which he had incurred by taking out of the attorney's bill items which he was entitled to charge. Under these circumstances, the present rule ought to be discharged. A preliminary objection, however, might have been taken to the application, for the whole was, in fact, *res judicata*. The whole matter had been referred to the Master, and the rule for a review of his taxation discharged. All objections to the items charged in the bill were or ought to have been taken either on the taxation or on the discussion of the rule. The present was therefore merely an attempt to have a second review of the Master's taxation.

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Erle and *G. T. White*, in support of the rule, contended, that this was not a matter which had already been decided. On the rule for the review of the Master's taxation, the question was as to the gross amount of allowance or disallowance. But the subsequent application of *Mr. Turner* to obtain an attachment for not paying the costs of taxation compelled the defendant to come to the Court to consider the propriety of the introduction by the attorney of certain sums into his bill. The present case was similar to that of *Woollison v. Hodgson*, already cited. There the attorney could exercise no discretion as to the amount which he was to pay, and therefore the Court held that the sum paid was not properly introduced. In the case of *Franklin v. Featherstonhaugh*, the attorney might have exercised some discretion, and therefore the Court was of opinion, that the sum in question might be made an item in his bill. In the case of *Hays v. Trotter*, the Court proceeded on the same principle as in *Woollison v. Hodgson*. The principle to be drawn from these cases was, that where a payment was

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of such a nature, that the attorney could not exercise any discretion over it as to its amount, it ought not to be introduced into the bill. Here the amounts in question were of that description, and therefore ought not to be introduced into the attorney's bill.

COLERIDGE, J.—Before I examine the merits of the case, it is right to observe that I think the application might have been answered by the preliminary objection, that the case has been heard and decided before. Because, though Mr. *Turner* and these parties were before the Court with an ostensibly different object, namely, for the purpose of reducing the gross amount of the bill, yet I think that the parties bringing the bill before the Court were bound to make every objection to which they considered the bill liable. Unless some such rule were to be adopted, that a case once decided cannot be brought before the Court again, it would be impossible that the public business could be completed. But as the matter has been strongly pressed, I will give my judgment on the merits of the application.

The question is, as to the propriety of introducing these two sums into Mr. *Turner's* bill. If they have been properly introduced, then this application must fail. In the first place, what says the act of Parliament on which the right of taxation depends. The 2 *Geo. 2*, c. 23, s. 23, provides, that an attorney shall deliver to his client a bill of his "fees, charges, and disbursements." That is the bill which is to be submitted to taxation, and it is according to the sum taken off the bill on taxation that the liability to pay the costs of such taxation is to be determined. According as the sum taken off has or has not amounted to one sixth, the Courts have, except under special circumstances, determined that the attorney or the client shall pay those costs. Now, when this motion was made, I should collect that the ground stated was, that a sum of money had been paid by the client to the attorney to liquidate a

certain demand; that that demand consisted of these two sums, and that, therefore, they ought not to have been introduced into the bill. If it had been shewn that the 59*l.* 12*s.* had been paid by the client to the attorney to make some specific payment, over the amount of which the attorney was to have no discretion, and that therefore he was to act merely as a conduct pipe, then, according to the case of *Woollison v. Hodgson*, that would not properly be a disbursement, which ought to be introduced as a taxable item into the bill. But that does not appear here to have been the case. The sum of 59*l.* 12*s.* was one of several sums paid by the client to his attorney. Mr. *Erle* said, that the test by which to try whether items ought to be introduced into the bill was, by considering whether they were charges over which the attorney could exercise any skill or care as to their amount. If they were such, then they were not taxable items, and ought not to be introduced into the bill. In order to determine whether this is a true test, let us look at the act of Parliament, and ask whether such a sum is a disbursement. Is not such a payment a disbursement, although absolutely fixed by some other means than the attorney's discretion? If the client's money come generally to the hands of the attorney without any specific direction as to the mode of applying it, and he uses it for the client's purposes, although the proportions in which he shall use it is not determined by his discretion, such use must constitute a disbursement within the meaning of the act of Parliament, and consequently be properly introduced into the attorney's bill. The test, therefore, suggested at the bar does not appear to me a true one. I think, therefore, that the present rule ought to be discharged, and with costs.

Rule discharged with costs.

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WATTS v. BURY.

The Court will allow judgment to be entered up on an old warrant of attorney on the 17th of May, although the defendant has not been seen alive since the 23rd of April previous.

HUMFREY moved on the 17th of *May* for leave to sign judgment on an old warrant of attorney. The affidavit on which he moved stated, that defendant had been seen alive on the 23rd of *April*. The defendant had consequently not been seen alive during the term. Since the promulgation of 3 *Reg. Gen. H. T. 4 Will. 4* (Pleading Rules) (a), that was not necessary to be shewn. The words of that rule were, "that all judgments, whether interlocutory or final, shall be entered of record on the day of the month and year, whether in term or vacation, when signed, and shall not have relation to any other day." This rule having abolished the principle of relation, it was immaterial at what time, so far as respected the term, the defendant had been seen alive. In the case of *Cockman v. Hellyer* (b), the Court allowed judgment to be signed on the first day of term, the affidavit stating that the defendant had been seen alive on the day previous. When once the necessity for shewing the defendant to be alive within the term was removed, it was difficult to put a limit to the time within which he must appear to have been alive. Some Judges said, it must appear that the defendant was alive within a reasonable time, but that afforded a very uncertain guide. The plaintiff would sign judgment at his own peril, as, if the defendant were dead at the time of signing, he would have had the expense and trouble of signing without any corresponding advantage.

COLERIDGE, J.—You may take your rule for signing judgment.

Rule granted.

(a) Ante, vol. 2, p. 313.

(b) Ante, vol. 2, p. 816.

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YARDLEY v. JONES.

BUSBY shewed cause against a rule *nisi* obtained by *Arnold*, for setting aside the writ of summons for irregularity. The plaintiff was an attorney, and sued in person, and the objection was, that his residence was not sufficiently stated in the indorsement on the back of the writ, according to the provisions of the Uniformity of Process Act, and the form prescribed in the schedule to that statute. In the schedule to the act, where the writ was issued by the plaintiff in person, the form of the indorsement was, "This writ was issued in person by *A. B.*, who resides at ———." The indorsement here was, "This writ was issued by *William Yardley*, of *Nelson Terrace, Stoke Newington*, in the county of *Middlesex*, attorney, in person." The mere substitution of the word "of" for "resides at" could make no possible difference in the meaning of the indorsement, and, therefore, could not constitute any irregularity. Another objection was, that "*Nelson Terrace, Stoke Newington*," was not his real place of abode, because his private residence was at *West Hackney*. It was true that the plaintiff had a private residence at *West Hackney*, but his office, where he carried on his business, was at *Nelson Terrace, Stoke Newington*. That was the proper place of abode for the attorney to mention on the process, as that was the place where he might be most conveniently found. The order of the words, and the introduction of the word "attorney," must be immaterial. It was also sworn that there was no number to the house, therefore none could be given.

It is sufficient to describe an attorney plaintiff, in the indorsement on a writ of summons, as "of" a particular place, without stating him to reside there.

An attorney plaintiff's place of business is the proper "residence" of which to describe him.

Seem, that if he were described of his private house, where he did not carry on his business, it would be sufficient also.

An alteration in the order of the words of the indorsement, or the addition of others, is immaterial, if the sense remains the same.

Arnold, in support of the rule, contended, that the form prescribed by the statute must in all cases be strictly pursued. He cited *Smith v. Crump* (a), where Mr. Justice *Parke*

(a) Ante, vol. 1, p. 519.

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made these observations—"The statute provides the form in which the summons is to be drawn, and if parties will not take the trouble of looking at the act before they proceed, they must take the consequences. If we once enter into the question as to what is material and what is immaterial in the process, we shall have innumerable questions of that sort coming before the Court. The best way is to make parties remember the course they ought to pursue by setting aside their proceedings for not doing what they ought." Again, in *Rice v. Huxley* (a), Lord Lyndhurst observes, "There are certain forms prescribed by the act, which directs that they shall be adopted. It is a matter of great public convenience that they should be adhered to." Here a dereliction had been committed of the form prescribed by the act of Parliament, and, therefore, the process ought to be set aside. The place of abode here given, in which the plaintiff, who was an attorney, carried on his business, was not a sufficient compliance with the act of Parliament. A distinction was taken between the attorney's abode and his residence in sect. 12 of the 2 Will. 4, c. 39. That section directed that every writ issued by authority of the act "shall be indorsed with the name and place of abode of the attorney actually suing out the same; but in case no attorney shall be employed for that purpose, then with a memorandum expressing that the same had been sued out by the plaintiff in person, mentioning the city, town, or parish, and also the name of the hamlet, street, and number of the house of such plaintiff's residence, if any such there be." The meaning of this section must be, that where the attorney acted in his character of attorney for another person, the place where he carried on his business must be indorsed; but, when he was the plaintiff himself in a cause, his place of residence, where he slept and his family resided, must be in-

(a) Ante, vol. 2, p. 231.

serted. Under these circumstances, the present rule ought to be made absolute.

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COLERIDGE, J.—I am of opinion that this rule ought to be discharged. I agree with the observation that it is important to adhere to the forms prescribed by the legislature. It would lead to dangerous questions if we were to admit their materiality to be discussed. But I think that the present case ought to be decided according to the principle suggested by Mr. Justice *Vaughan*, in the case of *Forbes v. Mason (a)*, where, on a similar application to the present, he said, "Can ingenuity suggest a variance in the meaning?" So, in the present case, I ask, can ingenuity suggest any difference between "*A. B.* of" and "*A. B.* who resides at?" I can see none. But then it is said that there is a difference recognised by the act of Parliament between "residence" and "abode;" that as the legislature has mentioned two things, it must be taken to have meant two different things. It is said that the "abode" of the attorney must mean his place of business. I should rather have thought, however, that it meant the place where his family resided, if any distinction were to be made. But I do not think that the legislature intended to make any distinction between "abode" and "residence." The alteration in the order of the words can make no difference in the meaning of the indorsement, and the introduction of the word "attorney" cannot vitiate it, as that only operates as an additional description. Then, the objection that the number of the house has been omitted is equally unavailing, because it is sworn that there is none to the house. We should lose the fair meaning of acts of Parliament if such exceedingly subtle objections were allowed to prevail. As it does not appear to me that ingenuity can suggest a variance in the meaning between

(a) Ante, vol. 3, p. 104.

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the words used and the words prescribed by the act of Parliament, I think the present rule must be discharged, with costs.

Rule discharged, with costs.

HANSON v. SHACKELTON.

A writ of summons, dated on a *Sunday*, is a nullity, and the objection is not waived by lapse of time.

The Court is bound to take judicial notice that a particular day of the month falls on a *Sunday*.

CARROW shewed cause against a rule *nisi*, obtained by *Robert Bayly*, junr., for setting aside the writ of summons in this case, and all proceedings thereon. The objection was, that the writ was dated on a *Sunday*. He objected, however, that the application was too late. The writ had been served on the 5th *May*, and the declaration filed on the 23rd. On the 28th the plaintiff was served with the present rule. By 1 *Reg. Gen. H. T. 2 Will. 4*, s. 33 (a), it was ordered, that "no application to set aside process or proceedings for irregularity shall be allowed, unless made within a reasonable time." Here, the application was to set aside the process, and it was not made within a reasonable time; the present rule ought, therefore, to be discharged. He cited *Tyler v. Green* (b), the marginal note of which was—"A writ was served on the 25th of *October*. An application on the 3rd of *November* to set aside the service for irregularity (the 2nd being a *Sunday*), was held to be out of time, and that it should have been made on the 1st."

Bayly, in support of the rule, contended, that, as to the objection on the other side, which proceeded on the supposition that the defendant's laches had operated as a waiver of the objection, it was to be observed, that the defect of which complaint was here made did not merely amount to an irregularity, but to a nullity. An irregu-

(a) Ante, vol. 1, p. 187.

(b) Ante, vol. 3, p. 439.

rity might be waived, but a nullity could not. He cited *Garratt v. Hooper* (a) and *Roberts v. Spurr* (b). He contended that *Sunday* was a *dies non juridicus*, and that a writ bearing date on that day was clearly void; and cited *Shepherd's Abridgment*, vol. 3, 181, "that if any part of the proceedings in a suit of law be entered and recorded to be done on *Sunday*, it makes the whole void;" and the case of *Vaughan v. Lloyd*, shewing that if an original should bear date on *Sunday*, the appearance of the party would not help it. *Viner's Abrid.*, tit. *Sunday*, C. Again, by 2 Will. 4, c. 39, s. 12, it was provided, "that every writ issued by authority of this act shall bear date on the day on which the same shall be issued, and shall be tested in the name of the Lord Chief Justice or Lord Chief Baron of the Court from which the same shall issue, or in case of a vacancy of such office, then in the name of the senior puisne Judge of the said Court." If the writ of summons was to bear date on the day on which it was issued, how could *Sunday* be a proper date for it, the Court not sitting on that day? The writ, therefore, did not, in conformity with the provisions of that section, bear date on the day on which it was issued. This was another authority to shew that the writ was a nullity. The above-cited cases shewed that a nullity could not be waived; and, therefore, the present rule must be made absolute.

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COLERIDGE, J.—Have you any affidavit shewing that the day on which this writ is dated was a *Sunday*?

Bayly.—The affidavit does not state that the day on which this writ is dated was a *Sunday*; but the writ is incorporated in the affidavit, and, the day of the month being given, the Court is bound to take judicial notice on what

(a) Ante, vol. 1, p. 28.

(b) Ante, vol. 3, p. 551.

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day of the week that day fell. The almanack is part of the law of the land.

Cur. adv. vult.

COLERIDGE, J.—I have consulted the other Judges of the Court, and they are of opinion that I ought to take judicial notice of what the day was on which this day of the month fell; and we are also of opinion that, the writ being dated on a *Sunday*, it is a nullity, and, therefore, that the lapse of time has not waived the objection. The present rule must, therefore, be made absolute, but without costs.

Rule absolute, without costs.

FIELDER v. CROW.

The poverty of a defendant is not a sufficient excuse for not proceeding to trial, unless it appears that the knowledge of that poverty reached the plaintiff after the commencement of the suit.

KNOWLES showed cause against a rule obtained by *Milner* for judgment as in case of a nonsuit. The reason assigned in his affidavit was the poverty of the defendant; but it did not state that the knowledge of that poverty had reached the plaintiff since the commencement of the action. A more satisfactory affidavit could have been obtained but for the lateness of the time at which the rule was served.

Milner supported the rule.

COLERIDGE, J.—It should appear that the plaintiff was not aware of the defendant's poverty until after the commencement of the action, in order to excuse him for not proceeding to trial. However, as it appears that there was some delay in serving the rule, I think it may be enlarged. The plaintiff must pay the costs of this application.

Rule enlarged accordingly.

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COPELAND v. NEVILL.

W. H. WATSON moved, under the 2 Will. 4, c. 39, s. 3, for leave to enter an appearance for the defendant, a *distringas* having issued, and the sheriff having returned *non est inventus* and *nulla bona*. The affidavit on which he moved was a joint one of the sheriff's officer and a person named *William Willis*. The affidavit stated, that, on the 16th day of *May* last, he went to the residence of the said defendant, No. 7, *Park Crescent, Regent's Park*, in the county of *Middlesex*, and inquired for the said defendant, for the purpose of serving him with and executing the writ of *distringas* issued in this cause, hereto annexed; when a man-servant there informed this deponent and the said *William Willis* that the said defendant and his family had recently left the house; and this deponent then inquired of the said man-servant where the said defendant was to be found, but could not obtain any intelligence of the said defendant or of his place of residence; and this deponent then told the said man-servant, that he, this deponent, would call again, and requested him to endeavour to learn where the said defendant had gone to reside, or could be met with. And this deponent further saith, that he called at the said house for the like purpose of finding the said defendant, on the 25th day of *May* last, but could not obtain any intelligence of the said defendant or of his place of abode; and this deponent further saith, that he, this deponent, on the 30th day of *May* last, again called at the said house, and inquired for the said defendant, but could not learn any thing of him or of the place of his abode; and this deponent then left a true copy of the said writ of *distringas*, hereto annexed, with a man-servant on the premises at the said house, No. 7, *Park Crescent* aforesaid, and requested him to let the said defendant have such copy, if

On the sheriff's return of *non est inventus* and *nulla bona* to a writ of *distringas*, if it appears that the defendant keeps out of the way to avoid his creditors, the Court will allow an appearance to be entered for him; but will not on the same motion give leave to stick up notice of declaration in the office.

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he came there; and this deponent further saith, that the said *William Willis* waited a little way from the said house, No. 7, *Park Crescent* aforesaid, at the two last times of the deponent calling there as aforesaid, for fear that the said defendant should be informed that a sheriff's officer was inquiring for him. And this deponent further saith, that *Park Crescent* aforesaid and the immediate neighbourhood there is inhabited by nobility and gentry, of several of whose servants this deponent made inquiries for the said defendant; but all the information that this deponent could obtain about the said defendant was, that he had gone abroad to avoid proceedings at law against him by his creditors, which information this deponent believes to be true. On this state of facts, it was sought to obtain leave to enter an appearance for the defendant, and, at the same time, leave to stick up a notice of declaration in the office.

COLERIDGE, J.—You may enter an appearance; but I cannot permit you, on this application, to stick up a notice of declaration in the office. You must come again, another day, for that purpose.

Rule accordingly.

W. H. Watson, on a subsequent day, applied for leave to stick up a notice of declaration in the office. His affidavit stated the additional facts, that the deponent had gone to the defendant's house in *Park Crescent*, but, although he had inquired of a female-servant there, he could obtain no information as to where the defendant then was. The deponent served a copy of the notice of declaration upon her.

COLERIDGE, J.—You may have leave to stick up the notice of declaration in the office.

Rule accordingly.

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BATTEN v. SQUIRES.

KNOWLES applied for a *certiorari*, under the 19 Geo. 3, c. 70, s. 4, to remove the record of a judgment in an inferior Court of record into this Court, for the purpose of suing out execution upon it. He felt some difficulty as to whether the present judgment, which had been obtained by the defendant, was within the statute on which he moved. The words of the section were, "in all cases where final judgment shall be obtained in any action or suit in any inferior Court of record, it shall and may be lawful to and for any of his Majesty's Courts of record at *Westminster*, upon affidavit made and filed of such judgment being obtained, and of diligent search and inquiry having been made after the person of the *defendant* or his effects, and of execution having issued against such person or effects, and that they are not to be found within the jurisdiction of the inferior Court, to cause the record of the said judgment to be removed into such superior Court, and to issue writs of execution thereupon to the sheriff of any county or place against the *defendant's* person or effects, in the same manner as upon judgments obtained in the said Courts at *Westminster*." The words of the section only applied to judgments obtained by plaintiffs. The present case, although not within the letter, was certainly within the equity of the act.

Semble, that the 19 Geo. 3, c. 70, s. 4, empowering the removal of judgments from inferior Courts of record, does not apply to judgments obtained by defendants.

COLERIDGE, J.—The words of the statute clearly have only reference to judgments obtained by plaintiffs; and therefore, in the absence of authority to shew that they can be extended to judgments obtained by defendants, I think I must hold, that you are not entitled to your rule. You may, if you choose, take a rule *nisi*.

Rule granted.

Knowles, after this intimation, declined drawing up the rule.

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ALLENBY v. PROUDLOCK and STOKES.

An award made in pursuance of an order of *Nisi Prius*, referring a cause and other matters in difference, may be objected to at any time before the end of the term next after publication.

In stating the grounds on which it is sought to set aside an award, it is not sufficient to state a general head of objection, as "misapprehension of the terms of the reference."

ATCHERLEY, Serjt., and *R. Alexander* shewed cause against a rule *nisi* obtained by *C. Cresswell* for setting aside an award, on various grounds.

C. Cresswell was heard in support of the rule.

Cur. adv. vult.

The facts and the arguments on both sides having been most fully stated and considered by the learned Judge, in his very able judgment, no further mention of them is here made.

COLERIDGE, J.—This was a rule obtained on the 30th of *January*, 1835, to set aside an award made on the 20th, and served on the 23rd *December*, 1834—and upon shewing cause, a preliminary objection was taken that the motion was made too late, being after the first four days of *Hilary* term, the term immediately succeeding the publication of the award.

The reference was made under an order of *Nisi Prius*, in a cause standing for trial at the *York Spring Assizes*, 1834. A verdict was taken for the plaintiff—the reference was of all matters in difference in the cause between the parties—a verdict for plaintiff, or nonsuit, or verdict for the defendants was to be entered, as the arbitrator should direct—the defendant's fourth plea was to be withdrawn—the arbitrator was empowered to declare what should be done by either party, and what road the defendant should have.

The general principle on which the time for moving to set aside an award is limited, is very clear; in all cases under the statute of 9 & 10 *Will. 3*, c. 15, the statute itself by the second section gives the rule, and the motion must

be made before the last day of the next term after the making and publication of the award. In all other cases, the Courts have to act upon their own discretion, which they regulate, however, by two general rules adopted for that purpose; by the first, the arbitrator is considered merely as a substitute for the jury, and the award as standing in the place of a verdict, from which it has followed that the motion to impeach it is treated as a motion for a new trial, and required to be made within the first four days of the term following the publication;—by the latter, the limitation prescribed in the statute is considered as a proper guide, and the motion is required to be made before the last day of the term. Both these rules, however, in their application are under the discretionary power of the Courts, who will relax them upon sufficient grounds shewn.

In the present case, the question is, on which of these rules ought the Court to act? According to the latter, the application is in time—it is too late according to the former—and no special grounds are assigned for any relaxation, if the former be the proper rule to apply.

Upon principle, it should seem, that the former rule would only be properly applicable to cases in which the reference was at *Nisi Prius*, a verdict taken *pro forma*, and the cause only referred: wherever the cause was referred at an earlier stage, it would be found in many supposable circumstances very difficult to apply it with certainty as to time; and where more is referred than the matters in the cause, the foundation of the rule fails; and as to the matters out of the cause, with regard to which no action had been brought, the reference would appear rather to be founded on the statute than to proceed under the general authority of the Court.

If the earlier cases are referred to, the origin of this rule, which is of comparatively modern date, may be precisely traced; and it is worth examination, for the purpose

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of seeing whether the rule itself is properly applicable to the case now before the Court. At first, where a verdict had been taken *pro formâ*, and was reduced by an award, it was usual not to enter up judgment without leave of the Court. In *Kettle v. Grove* (a), the Court said the plaintiff had no right to enter judgment without leave of the Court. In *Higginson v. Nesbitt*, which was decided in 1797 (b), the Court of *Common Pleas* at first thought the motion must only be for a rule to shew cause; but being pressed by the practice of the *King's Bench*, it was allowed to be absolute in the first instance. In *Grimes v. Naish* (c), which occurred in 1796, a case of the preceding year, though later reported, the same Court, under similar circumstances, thought the plaintiff entitled to the *postea*, without any application to the Court. In *Lee v. Lingard* (d), which was decided in 1801, the same point was discussed in the Court of *King's Bench*, and decided in the same way, on the principle that the award was in place of the verdict of the jury, and followed by all the same consequences. In *Borrowdaile v. Hitchener* (e), which occurred in 1802, the Court of *Common Pleas* acted on this principle, and followed it out to one of these consequences, holding not merely that judgment might be entered up on the award without application to the Court, but that any attempt to impeach *the verdict* as founded on the award (these are the words of Lord *Alvanley*) must be made within the first four days of the term. It is very material, however, to observe that this observation was entirely extra-judicial. The motion was to set aside the *execution* on the verdict and judgment:—*first*, because the verdict could not be reduced, or judgment entered up, without leave of the Court; *secondly*, because it could not be

(a) Barnes, 57.

(b) 1 B. & P. 97.

(c) 1 B. & P. 480.

(d) 1 East, 401.

(e) 3 B. & P. 244.

entered up before the end of the term; *thirdly*, because there had been no personal notice of the award. The question of moving to set aside the award was not in discussion. This was a case (and it is remarkable as being the first in which I find the limitation imposed in terms) in which the reference was of all matters in difference. The verdict, however, was taken for 150*l.* and reduced by the arbitrator to 113*l.*; and it does not appear that any thing was done by him in any matter out of the cause. The case of *Synge*, executor, v. *Jervoise* (a), which follows next in point of time (1807), is important, as shewing that the principle of regarding the award as a *verdict* is the ground of the practice. There, the reference was under an order of *Nisi Prius*, as in the former cases, but there was no verdict; a juror was withdrawn, and the Court entertained the motion to set the award aside, though a whole term had elapsed since the making of it, the only question being, whether the case was within the limitation of the statute. *Rogers v. Dallemore* (1815) (b) was a case of an award under a Judge's order, and therefore does not apply directly to the present case; but it is material, so far as it shews that it was the *cause*, and the control which the Court retained over the cause, which were considered as the foundation of the Court's authority over the award.

This brings me to the cases relied upon by the defendants in support of their preliminary objection. Down to this point, there is no authority which can be said to impeach the doctrine, that the limitation of four days is founded upon the principle that the award is a mere substitute for the verdict, or to shew that the limitation applies to any cases in which the verdict and award are not co-extensive in subject matter, though varying in amount.

Thompson v. Jennings (1825) (c) was the earliest case

(a) 8 East, 466.

(b) 6 Taunt. 111; 1 Marsh. 471.

(c) 10 Moore, 110.

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cited; but this can be no authority for the defendants, because in it, upon a motion to set aside a verdict, the Court ordered it to stand, and merely referred it to the arbitrator to ascertain the amount. The Court held that an application to set aside his award came too late after the first four days of the ensuing term; but upon reference to the report, it will be seen that all the cases on the authority of which the judgment proceeds, refer to the *verdict* only, as the ground of their decision.

Rawsthorne v. Arnold (a) followed two years after; in that the cause and *all matters in difference* were referred by an order of *Nisi Prius*; the award was made in *December*, the motion was not made till *Easter Term*—it was therefore unnecessary to decide more than that the period even allowed by the statute was exceeded. Lord *Tenterden*, indeed, says, that the motion should have been regularly made within the period allowed for moving for a new trial; but this observation was extra judicial—and it is to be observed beside, that it does not appear that the arbitrator had interfered with any thing out of the cause, the contrary is rather to be inferred—and it should seem also that a verdict had been taken at *Nisi Prius*.

Bennett v. Shardon (b) is no authority. It shews no more than the opinion of a learned counsel, that it was a safe course to guard against an objection like the present, by obtaining, within the first four days of the term, leave under special circumstances to move against the award afterwards. The motion was unopposed, and, as in the former cases, a verdict was taken; and it does not appear that the arbitrator went beyond the issues in the cause.

In *Sell v. Carter* (c), the facts, the arguments, and the judgment are so shortly stated, that it is difficult to say on what principle the decision went: it does not appear whe-

(a) 9 D. & R. 556; 6 B. & C. 629.

(b) 5 M. & R. 10.

(c) Ante, vol. 2, p. 245.

ther any verdict was taken, nor whether the arbitrator went beyond the issues in the cause; it should seem as if the counsel for the motion had rested his case solely on the defects being on the face of the award, and had not drawn the attention of the Court to the point now under discussion.

In *Macarthur v. Campbell* (a) the award was made in *November*, and the motion to set it aside in *Easter* term following; and not a word is said in the report of the necessity to move within the first four days of the following term.

I have thought it right to examine the cases cited by the counsel for the defendant, because if they had borne out the position for which they were cited, I should not have felt myself justified in opposing my opinion to the weight of their authority; but upon examination, they seem to leave me at full liberty to say, that the limitation of four days is founded on a principle which applies only to cases in which a verdict is taken, and the arbitrator, placed in the position of the jury, makes an award in substitution of that verdict, confined only to the subject matters at issue in the cause. In the present case, other matters were referred than those embraced by the cause, and upon them the arbitrator has decided. As to them, it seems to me the reference must be considered as made under the statute, and if it be, the Court has no power to abridge the period given by the statute for questioning the award. Even if it be only doubtful whether the reference to this extent may be so considered, it seems to me less safe to adhere to a limit merely adopted by the discretion of the Courts, than to run the risk of contravening the statute. And I may add, that as in my opinion, if the whole question were *res integra*, it would be more convenient to have but one period within which all awards might be ques-

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(a) 2 Nev. & Man. 444; 5 B. & Ad. 518.

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tioned, I am not disposed to depart from the general rule farther than I find myself compelled by authority. On these grounds, I think the preliminary objection ought not to prevail.

It becomes necessary, therefore, to consider the objections made to the validity of the award. The first of these, "that the arbitrator has made his award under a misapprehension of the terms of the reference," cannot, I think, be inquired into, for want of being more specifically defined in the rule. The case of *Boodle v. Davis*, decided in the *King's Bench* in the last term, and cited by Mr. *Alexander*, is a direct authority, that it is not enough to state a general head of objection, as misapprehension, excess of authority, inconclusiveness, &c.; but it is necessary to point specifically to the instance with respect to which any such fault is imputed: indeed, unless the rule of Court be so interpreted and enforced, it is absolutely useless. To make the second, third, and fourth intelligible, it is necessary to advert to the pleadings in the cause. The declaration complained of a trespass in the plaintiff's close, called *Hurding Lane*. By the third plea, the defendants alleged *Proudlock* to be the occupier of a close of land, and claimed for him, by a twenty years' enjoyment, a private way from a common highway, through and over *Hurding Lane* to his close, and so back again. On this, issue was taken. By the fourth plea the defendants set up a public highway through and over *Hurding Lane*; on which issue was also taken. By the terms of the reference this fourth plea was to be withdrawn; but the arbitrator, in whose discretion the costs of the cause were placed, was to decide on them as if it had remained on the record; and he was also to decide what road the defendant *Proudlock* should have. The arbitrator, by his award, found the third issue in favour of the defendants, establishing thereby the private way; and he also went on to set out for *Proudlock* a private way, which it was admitted,

included and extended beyond the way found under the third issue, and which was to be enjoyed "to all intents and purposes as if *Hurding Lane* for the whole length thereof were a common highway." He also gave the costs of the cause and of the reference to the defendants. Upon this state of the pleadings and the award, it does not appear to me that the second objection is sustained in point of fact, and it is therefore unnecessary to consider whether it would be necessarily inconsistent in law to suppose a private and public highway over the same surface of land.

The third objection, that "upon evidence of a public highway the arbitrator had found a private right of way;" and the fourth, that there was no evidence to support the third plea, will be found to turn upon the merits of the case, as to which the arbitrator had alone power to form a judgment. It was conceded that many witnesses were called to prove a public highway, and it was sworn that several were called to prove the private way. Mr. *Cresswell* contended, that in point of law the arbitrator was bound to refer the evidence of the latter to the support of the former, and that, in a right judgment upon the testimony, the necessary result was in favour of a public highway, and so destructive of the private. But the arbitrator, who was bound to hear both classes of witnesses, was also to determine on the weight of their testimony; and how can the Court say, that he did not consider the witnesses called to prove the private way as overpowering in weight and credibility those who attempted to prove the public? His deliberate judgment is rather to be collected from his award than from declarations—premature, at least, if not ill considered—which upon the affidavits he is sworn to have used in the course of the arbitration; but which may have been unintentionally, and it is sworn have been, much misrepresented.

The fifth objection is, that the arbitrator has exceeded his power in directing a verdict for the defendants on the

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issue on the third plea, and giving them all the costs of the cause, and of the reference, including the costs of inquiry into the issue joined on the plea withdrawn. This objection was argued principally on the ground that it could not be right to give the costs to the defendants both of the third and fourth issues; but it must be remembered, that when the cause came to the arbitrator, the fourth issue was out of it, except for the particular purpose of determining the costs of the cause thereby, if necessary, and he was directed for that purpose only to consider it as part of the record. This provision was no doubt made to secure the defendants the general costs, even if all the pleas should be found against them but the fourth, supposing they could establish that. When the arbitrator had decided in favour of the defendants on the third issue, any inquiry as to the fourth might, strictly speaking, become unnecessary; but I cannot say that he was not justified in instituting that inquiry at the same time with the rest, in the progress of the reference; if so, it might form properly a part of the costs of the reference, over which he has absolute power.

I am of opinion, therefore, that none of the objections made can prevail. A good deal of the argument turned upon the additional way set out by the arbitrator: it is unnecessary to determine whether in that he has exceeded his power, nor what would have been the effect of such excess, as no objection pointing to it has been specified in the rule.

Rule discharged.

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JOHNSON, HAIGH, and GEORGE HOLDSWORTH, Assignees
of THOMAS HOLDSWORTH, a Bankrupt, v. HOLDSWORTH.

WIGHTMAN shewed cause against a rule *nisi* obtained by *Tomlinson*, to shew cause why the plea of release from the plaintiff *George Holdsworth* should not be set aside, and the release given up to the other plaintiffs to be cancelled. The facts, as they appeared on the affidavits, were these:—*Thomas Holdsworth* some time since became bankrupt, and his brother *George*, as well as the other two plaintiffs, became his assignees. The bankrupt was possessed of certain machinery, utensils, and effects in a mill. The defendant, who was also a brother of the bankrupt, became the purchaser of all the machinery in that mill. In the negotiation of this purchase, *George Holdsworth*, the assignee, principally acted, in the first instance: his co-assignees having confidence in his skill in the value of machinery. The sale was ultimately made by one of the co-assignees for the sum of 125*l.*, relying upon *George Holdsworth's* representation that it had been valued at 120*l.*, it having in fact been privately valued, as now sworn, at above 180*l.*, exclusive of the other things. There were affidavits in answer, partly contradicting and partly explaining these facts. The assignees did not attempt to set aside or refuse to complete the sale; but as the defendant took away not only the machinery, but the utensils and other effects, the present action of trover was brought against him for removing the things which they contended were not machinery. The defendant then applied to his brother, the assignee, who was one of the plaintiffs, and obtained from him a release of the action. This release he afterwards pleaded, with other pleas, to the declaration. As the plaintiffs could not proceed so long as the plea of the release remained on the record, the present application was made to compel the defendant to set

Where one of several plaintiffs, as assignees of a bankrupt, releases the cause of action, and the release is pleaded, the Court will set aside the plea, suspicion being thrown on the defendant's conduct in the transaction, the co-plaintiffs indemnifying the plaintiff who had given the release against costs.

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aside the plea, and deliver up the release. It was contended, however, that the Court had no power to order the release to be delivered up; and the Court would not exercise its discretion to set aside the plea, unless it appeared that fraud existed on the part of the defendant. On these affidavits, however, the alleged fraud (if not answered) did not apply to the point in dispute, and therefore the present rule must be discharged.

Tomlinson, in support of the rule, admitted, that it would be sufficient for the plaintiffs to have the plea of release set aside, for which there appeared sufficient grounds. This would be no injury to the defendant, because other pleas were on the record, which would enable the parties to try the question, as to what was comprehended in the terms of the sale of machinery. He cited 1 *Tidd, Prac.* p. 677, ed. 9, where Mr. *Tidd* had collected the cases on the subject. In *Mountstephen and Others v. Brook and Others (a)*, the Court set aside a plea *puis darrein continuance* of release, by one of several plaintiffs, without costs, on terms of indemnity against costs being given to the plaintiff who had released the action, though the consent of such plaintiff had not been obtained before action brought; it appearing, that no consideration had been given for the release, and that the plaintiffs sued as trustees for the creditors of an insolvent person. On this authority he submitted that the present rule ought to be made absolute for setting aside the plea.

COLERIDGE, J.—I cannot order the release to be delivered up to be cancelled. All I can do is to order the plea to be set aside. It appears from the affidavits in the present case, that the sale of this machinery was effected on the faith of an alleged valuation, and it appears that

(a) 1 Chit. Rep. 390.

the private valuation materially differed from it. This throws suspicion on the transaction, and the plaintiffs are entitled to try before a jury the question of the intent and meaning of the contract. I think, therefore, the present rule must be made absolute for setting aside the plea, the assignee, *George Holdsworth*, being indemnified by his co-assignees, the other plaintiffs. The rule must be discharged as to the residue.

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Rule accordingly.

— *See Elderton v. Farnham 4 C.B. 209; 5 D.L. 409.*

FRANKUM v. Lord FALMOUTH.

CURWOOD moved for a rule to shew cause why the Master should not review his taxation in this case. It was an action on the case, and was tried at the last *Summer Assizes for Abingdon*. The state of the pleadings was this. The declaration contained one count only, and alleged that the plaintiff was possessed of a water corn-mill with the appurtenances, and therefore of right ought to have and enjoy the water of a certain stream; and that the defendant diverted and turned large quantities of the water from the said mill, by reason whereof he was deprived of the gains and profits arising therefrom. To this declaration, the defendant pleaded—*first*, not guilty; *secondly*, that the plaintiff ought not, by reason of his possession of the said mill, to have had the benefit of the said water so diverted and turned; *thirdly*, that the defendant was seised in fee of certain closes contiguous to the said stream, and that the water had been wrongfully penned back by the plaintiff, and by reason thereof flowed upon the said closes of the defendant, doing damage there, wherefore he diverted and turned, &c.; *fourthly*, that the water so diverted and turned, as in the said declaration mentioned, ought not to run to the said mill as therein

Where, in an action on the case, a defendant succeeds on one of several issues, which goes to the foundation of the plaintiff's cause of action, he will be entitled to the general costs of the cause, although there is a verdict for the plaintiff upon the plea of "not guilty" without damages.

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mentioned. In his replication, the plaintiff joined issue on the first, second, and fourth pleas, and as to the third, he alleged, that the water had not been wrongfully penned back in manner and form as in the said plea alleged. On this the defendant joined issue. The jury found a verdict for the defendant on the first, second, and fourth issues, and for the plaintiff on the third, with 25*l.* damages. In *Hilary* term following, the Court of *King's Bench* directed a verdict to be entered for the plaintiff, on the plea of not guilty, without damages, leaving the finding of the jury on the third issue untouched. The question was, who was entitled to the general costs of the cause. The Master was of opinion that the defendant was entitled to the general costs in the cause, as issues were found for him, which went to the whole cause of action alleged in the plaintiff's declaration. It was now contended, that the plaintiff having the general issue found in his favour, he was entitled to the general costs of the cause.

COLERIDGE, J.—The fallacy on which that argument is founded is the calling the plea of “not guilty” the general issue. That plea is only a short mode of denying certain facts. Pleas have here been found in favour of the defendant, on which depend the plaintiff's right to the water, as it is claimed by him in his declaration. The issues found for the plaintiff are totally unimportant, as he has failed on the others. Upon this record, the defendant has succeeded. The jury have found against the plaintiff on one issue, on which the plaintiff must rely in order to be entitled to recover. The Master's taxation, therefore, allowing the defendant the general costs of the cause, is, in my opinion, correct.

Rule refused.

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KLOS, Assignee, &c., of M'DOWALL, v. DODD.

THEOBALD moved for a rule to shew cause why the plaintiff should not be at liberty to amend his declaration in *sci. fa.* under the following circumstances. A person named *M'Dowall* had recovered from the defendant a debt of 500*l.* and 3*l.* 5*s.* damages for its detention. After obtaining a judgment for this sum, *M'Dowall* became insolvent, and the present plaintiff was appointed his assignee. On the judgment so previously obtained by the insolvent, the plaintiff sued out a writ of *sci. fa.*, on which execution was awarded to *Klos*. That execution was never carried into effect, and now a second *sci. fa.* was issued. In the declaration on this second writ, it was recited, that one *M'Dowall* recovered a debt of 500*l.* and 3*l.* 5*s.* damages for the detention thereof; that *M'Dowall* afterwards became insolvent, and his estate and effects were assigned to *Klos*; and that afterwards execution was awarded to *Klos*, "as assignee as aforesaid," for "debt and damages aforesaid," as appeared by the record, &c. The defendant pleaded that there was no such record, whereby it was considered that *Klos*, "as assignee as aforesaid," should have execution against *Dodd* for "debt and damages aforesaid," in manner and form &c.

If a plaintiff issues a second *sci. fa.* on one judgment, and in the declaration on such second *sci. fa.* he misrecites the proceedings on the prior one, he may abandon that, amend, and proceed on the original judgment.

The plaintiff replied, that there was such a record, and stated the term and number of the roll. On production of the roll before the Master, for the purpose of inspection, it appeared, that the execution was awarded thus, "that the said *John Klos* have his execution for the damages aforesaid." There was consequently a variance between the declaration and the roll. On the roll it appeared, that the execution had been awarded to *John Klos* alone, and not as assignee; while the declaration alleged it to have been to *John Klos*, as assignee. On the roll it appeared, that execution had been awarded for da-

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mages only; while on the declaration it was alleged to have been for debt and damages. The object of the present application was to amend the roll in the previous *sci. fa.* by the original record in the action commenced by *M' Dowall* against the defendant.

COLERIDGE, J.—This is not the ordinary application to amend a declaration by a record, but it is here sought to amend a record by a declaration. How does it appear, in the case, that the plaintiff has any interest in the subject matter of this action?

Theobald.—It is recited in the first *scire facias*, that *M' Dowall* had become insolvent, and that his estate and effects have been assigned to the plaintiff.

Rule *nisi* granted.

Miller appeared to shew cause in the first instance, and contended, that this was not a case in which the Court could interfere to make such an amendment as the plaintiff required, either under the 9 *Geo. 4*, c. 15, or the 3 & 4 *Will. 4*, c. 42. It was not like an application at *Nisi Prius* to amend a declaration by a document produced in evidence, but the object of it was, in fact, to make evidence for the plaintiff in support of his replication.

COLERIDGE, J.—I do not now enter into the question as to whether the Court has or has not power to amend an old record; but I think all difficulty may be removed by the plaintiff's taking no notice of the intermediate writ of *sci. fa.*, and proceeding at once on the original judgment obtained by *M' Dowall*. If that course is acceded to, he may amend the second *scire facias*, and his declaration thereon, by striking out all reference to the prior *sci. fa.* He will then have a judgment to support it. He must,

however, pay the costs of the amendment and of coming here to oppose an application for judgment of *nul tiel record*. The defendant will also be at liberty to amend his plea.

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Theobald acceded to the suggestion of his Lordship.

Rule accordingly.

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F. V. LEE moved on the second day of term to re-admit an attorney, on an affidavit disclosing the following facts:—The usual notices had been put up in the previous term, stating that the attorney would apply on the last day of the term for re-admission. By accident, the necessary affidavits could not be obtained time enough to make the application on that day, although they were sworn before. Under these circumstances, it was hoped, that the Court might allow the attorney to be re-admitted.

An attorney who has given his notices to apply for re-admission on the last day of one term, cannot apply on those notices for re-admission in the next.

COLERIDGE, J.—Any one wishing to oppose his re-admission, the notice being for the last day of term, would attend on that day for the purpose of so doing, but would not think of coming in the present term. For my own part, I think attention to correctness in the notices is perhaps more important in cases of re-admission than of admission. I will, however, consider the case.

Cur. adv. vult.

COLERIDGE, J.—In this case the party discontinued taking out his certificate for a satisfactory reason which was given, and put up the proper notices for his re-admission the last day of last term; on which day, owing to some

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inadvertence, the application could not be made, and in consequence the application was made the first day of this term. I think it a case within the same rule that applies to an original admission. In *Ex parte Bonner* (a), the party applied for admission in a subsequent term, and he was refused on the ground that it would open a door to a dangerous practice, as any person who wished to oppose the admission would not be prepared to do so. This seems to me to be the difficulty as to the present application, but as it is a hard case on the party, I think the notices may be put up now for his re-admission on the last day of this term.

(a) 6 Taunt. 335.

PITT v. WILLIAMS.

In error, where the transcript has been removed, the Court below has no jurisdiction to allow judgment of nonpros to be signed on account of its not having been prepared in due time, although no laches existed on the part of the defendant in error in endeavouring to sign such judgment.

SIR WILLIAM FOLLETT shewed cause against a rule obtained by the *Attorney-General*, requiring the plaintiff below to shew cause why the defendant below should not be at liberty to sign judgment of nonpros. The facts of the case were these:—A demurrer was decided in favour of the defendant on the 31st *January*, 1835, and on the 25th *April* notice of the allowance of a writ of error was served on the defendant. The plaintiff then obtained a summons for time to transcribe. The time so granted expired without the plaintiff transcribing. Application was then made to the clerk of the errors of this Court, to be allowed to sign judgment of nonpros, pursuant to 10 *Reg. Gen. H. T. 4* (Practice Rules) (a). The words of that rule were, “No rule to certify or transcribe the record shall be necessary; but the plaintiff in error shall, within twenty days after the allowance of the writ of error,

(a) Ante, vol. 2, p. 306.

get the transcript prepared and examined with the clerk of the errors of the Court in which the judgment is given, and pay the transcript money to him; in default whereof the defendant in error, his executors or administrators, shall be at liberty to sign judgment of nonpros." When the application was made to sign judgment of nonpros, under this rule, the clerk of the errors refused to permit such judgment to be signed without notice being given to the opposite attorney. Subsequently the record was transcribed, and the transcript removed. It was first objected, that the transcript having been removed into the Court of error, this Court had no jurisdiction over it, and, therefore, could not direct judgment of nonpros to be signed. If any application was to be made, it ought to have been made to the Court of error. But on the merits it was sworn, that all necessary efforts had been made to get the transcript prepared and examined in due time. Under these circumstances, the present rule ought to be discharged, with costs.

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The *Attorney-General* and *J. J. Williams* contended, that this Court had jurisdiction so long as the record remained in it; for so long the clerk of the errors, who was an officer of the Court, had the charge of it. Under the rule the defendant was entitled to sign judgment of nonpros, the record being then in this Court, and the clerk of the errors improperly refused to allow judgment to be signed. The defendant, however, had done all that was in his power to sign such judgment. Afterwards it was removed. The application therefore was to sign such judgment of nonpros, *nunc pro tunc*.

COLERIDGE, J.—So long as the cause and record remain in the Court below, the Court has jurisdiction over them; and unless the plaintiff in error gets the transcript prepared and examined within twenty days after the allow-

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ance of the writ of error, the defendant is entitled to sign judgment of nonpros. But the transcript here has in fact been annexed, and the cause is now in the Court above; this Court, therefore, has no power to entertain the application (a). If the clerk of the errors has acted improperly, the complaining party may take what steps he is advised against him. The present rule must, therefore, be discharged, and with costs.

Rule discharged, with costs.

(a) By 11 G. 4 and 1 W. 4, c. 70, s. 8, it is provided, "That writs of error upon any judgment given by any of the said Courts shall hereafter be made returnable only before the Judges, or Judges and Barons, as the case may be, of the other two Courts in the *Exchequer* Chamber, any law or statute to the contrary notwithstanding; that a transcript of the record only shall be annexed to the return of the writ; and the Court of error, after such errors are duly assigned and issue in error joined, shall, at such time as the Judges

shall appoint, either in term or vacation, review the proceedings, and give judgment as they shall be advised thereon: and such proceedings and judgment, as altered or affirmed, shall be entered on the original record, and such further proceedings as may be necessary thereon shall be awarded by the Court in which the original record remains, from which judgment in error no writ of error shall lie or be had, except the same be made returnable in the high Court of Parliament."—See 1 Dowl. Stat. 373.

HARRISON and Others, Assignees, &c. v. TURNER and Another.

An affidavit of debt, made by assignees of a bankrupt, claiming a certain sum for money lent, paid, &c. by the bankrupt, to and for the use and at the request of the defendant, "and for interest thereon agreed to be paid" by the defendant, is sufficient.

TOMLINSON shewed cause against a rule *nisi* obtained by *Wightman*, for rescinding an order made by Mr. Justice *Coleridge*, which directed that the writ of *capias* should be set aside and the bail-bond delivered up to be cancelled, on the ground of a defect in the affidavit of debt. The affidavit was in the following form:—"George

"and for interest thereon agreed to be paid" by the defendant, is sufficient.

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Harrison, of *Whitehaven*, in the county of *Cumberland*, banker, one of the assignees of the estate and effects of *Edward Johnston*, *Anthony Adamson*, and *John Hope*, late of *Whitehaven*, aforesaid, bankers, bankrupts, maketh oath and saith, that *Miles Turner*, of *Haigh*, near *Wigan*, in the county of *Lancaster*, and *William Bland*, of *Whitehaven*, in the county of *Cumberland*, late ironmongers and partners, are justly and truly indebted unto him, this deponent, *Thomas Milward*, and *Thomas Braithwaite*, as assignees of the estate and effects of the said *Edward Johnston*, *Anthony Adamson*, and *John Hope*, bankrupts, in the sum of 79*l.* and upwards, on the balance of accounts for money lent and advanced, and money paid, laid out, and expended, by the said *Edward Johnston*, *Anthony Adamson*, and *John Hope*, before they became bankrupts, to and for the use and on the account of the said *Miles Turner* and *William Bland*, and at their request, and for interest thereon, agreed to be paid by the said *Miles Turner* and *William Bland*, as appears to deponent by the books of account of the said bankrupts, and as he, this deponent, verily believes to be true." This affidavit, he was to contend, was defective. *First*, the statement as to interest due was deficient. The Courts had always been very jealous of the power exercised by plaintiffs to hold defendants to bail for interest. That appeared from the case of *Callum v. Leeson* (a), where Mr. Baron *Bayley* said, "What authority is there to shew that you can hold to bail for interest? I do not like the decisions, but cannot help it." The distinction which would be taken in support of the affidavit would be the very refined one between interest due by contract and interest claimed by way of damages. For the former a defendant could be holden to bail; but if he could, the statement of the claim ought to be as exact as in a count in *assumpsit*, stating a consi-

(a) Ante, vol. 2, p. 381.

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deration of forbearance for a promise to pay interest. If it were so, then no doubt could exist as to whether it was interest claimed on a separate agreement or merely for interest by way of damages, for which no arrest could take place. But, according to the mode in which the supposed agreement was here stated, it might be claimed either upon an insufficient consideration or by way of damages. According to the language of the affidavit, reference had been made to the bankrupt's books, and from them all the knowledge of the deponent was derived. The agreement to pay interest appeared by the books or it did not. If it did not appear by the books, then there was no reason for holding the defendant to bail, as the assignees could have no personal knowledge of it. If it did appear by the books, then the nature of the entries in the books should be shewn, that it might be seen if there was sufficient evidence of the agreement. The present case was different from that of an executor or administrator, who could only have knowledge of what had occurred during the life of their testator or intestate from examination of their books or papers; whereas here the bankrupt might have joined. Thus a better source of knowledge existed, to which the plaintiffs might have had recourse. If the bankrupt had joined, it might have been different. As it was, the affidavit was made by a deponent who had no knowledge except by reference to the books of another person, which were not evidence. Again, the affidavit was defective, because it was for money paid "to and for" the defendant. That this was defective appeared from the case of *Visger v. Delegal* (a).

COLERIDGE, J.—The words in the affidavit in that case were very different from those in the present. They were, "that the defendant was indebted to the plaintiff in the

(a) Ante, vol. 1, p. 333.

sum of 1000*l.* and upwards, on balance of account for money paid, laid out, and expended by the plaintiffs, to and for the defendant, and at his request." It was consistent with that allegation, that the money so paid to the defendant was in discharge of a debt due from the plaintiff to him.

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Wightman, in support of the rule, was stopped by the Court.

COLERIDGE, J.—As to the first point, with respect to the reservation of interest, the distinction has been taken between interest which becomes due in pursuance of an agreement and interest which becomes due by way of damages. For the former, a defendant may be arrested in the same manner as for the principal debt. Now here the words of the affidavit allege that the defendant is indebted for a certain sum, and "for interest thereon agreed to be paid." This allegation, therefore, states interest to be due in a way that will entitle a plaintiff to hold a defendant to bail. When this case was before me at Chambers, my attention was not called to those words. If it had, I should have been of opinion then, as I am now, that the affidavit was sufficient. But then, it is said, that the party who makes this affidavit takes upon himself to swear to this fact of the agreement from what is not within his own knowledge. Were we to enter into that question, we should, in fact, be considering the merits. It is not usual to consider the means of knowledge which a person making an affidavit of debt possesses with respect to the debt to which he swears. But the deponent here might have known of the agreement, because he might have been present when it was made. I do not, however, enter into that question. If the party swears positively to a debt, that is enough. The party swears to the interest being due, as appears by the books. The affidavit, therefore, is as certain with respect

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to the interest as to the principal. Now it would be a strange doctrine, that the same knowledge which entitles a party to swear to the principal sum being due is not sufficient as to interest. In addition to the remark I have already made with respect to the affidavit in the case of *Visger v. Delegal*, I may observe that it was bad on other grounds. The present rule must, therefore, be made absolute for rescinding the order.

Rule absolute.

M'DOUGALL v. NICHOLLS.

The Court has no power to compel a witness to attend to give evidence before the Master.

SEWELL moved for a rule to shew cause why a Mr. *James M'Dougall* should not be compelled to give evidence on an inquiry before the Master. The evidence of that gentleman was required in order to proceed satisfactorily in the inquiry before the Master, but he had refused to attend. The consequence was, that it became necessary to apply to the Court in order to enforce his attendance.

COLERIDGE, J.—It does not appear to me that I have power to compel Mr. *M'Dougall* to attend, and, therefore, you will take nothing by your motion.

Rule refused.

GOODALL v. RAY.

An indorsee of a promissory note, not overdue, but the amount of which is exceeded by a cross demand of the maker on the payee, having notice of such demand at the time of the indorsement, cannot recover against the maker advances made to the payee on the note subsequent to such notice, although the note is a distinct transaction between the original parties.

ADAMS, Serjt., and *Amos*, shewed cause against a rule nisi, obtained by *N. Clarke*, for referring back this cause to the arbitrator, with directions to him to order a verdict to be entered for the defendant, or to reduce the damages

the maker on the payee, having notice of such demand at the time of the indorsement, cannot recover against the maker advances made to the payee on the note subsequent to such notice, although the note is a distinct transaction between the original parties.

to 22*l.* 10*s.* The cause was referred by an order of *Nisi Prius* to a gentleman at the bar, with power to him to direct for whom and for what sum the verdict should be finally entered, and to state any special matters on his award. The award made in pursuance of that order was in these terms:—

“ I, the said arbitrator, do award, order, and adjudge that the verdict be finally entered for the plaintiff, damages 171*l.* 10*s.* over and above 270*l.* paid into Court, and that each party shall bear his own expenses of attending the arbitration, and shall pay the costs of this my award equally between them. And I do further state the following special circumstances: The action was brought by the plaintiff as indorsee of a promissory note, dated 25th *March*, 1830, whereby the defendant promised to pay to one *B. B.* or his order on demand 352*l.* for value received, with lawful interest for the same; the defendant pleaded, that the plaintiff had not sustained damages to a greater amount than 270*l.* paid into Court, and gave notice to the plaintiff to prove the consideration for the indorsement. The note was given for a valuable consideration, and was a distinct and separate transaction in itself, and independent of any collateral considerations or dealings between the parties. On the 5th of *July*, 1831, plaintiff advanced to *B. B.* the sum of 150*l.*; on the 29th *January*, 1833, the further sum of 100*l.*, on the deposit of the above note; but the note was not indorsed to the plaintiff until, as after stated, on the 16th *August*, 1833. The plaintiff had notice that *B. B.* was indebted to the defendant in a sum exceeding the amount of the note and interest upon which the action was brought. The defendant did not dispute the plaintiff's lien to the extent of 250*l.* and interest, nor did the plaintiff assert it to any further extent. After this period, *B. B.* indorsed the note to the plaintiff. In respect to the 250*l.* advanced and interest, the plaintiff would be entitled to 22*l.* 10*s.* over and above

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the sum paid into Court. At the time of bringing the action, *B. B.* was indebted to the plaintiff as well as to the defendant in sums respectively exceeding the amount of the note and interest."

The question upon this award was, whether the plaintiff, having had the note indorsed to him after notice that the payee was indebted to the maker to a larger amount, independent of the note, than its amount, could recover upon it, notwithstanding any supposed equity which the defendant might have upon it. It was contended, that the plaintiff was entitled to recover; for the change which had taken place was not such an equity as would deprive the plaintiff of his right, as the transaction with respect to the bill was found by the arbitrator to be separate from all others between the parties. This was not like the case of an indorsement after the note became due; for as the note was payable on demand, it could not be due until it was demanded; but no demand had been found by the arbitrator. The present case was analogous to that of *Burrough v. Moss* (a): the second part of the marginal note of that case was in these terms, "the indorsee of an overdue promissory note is liable, in an action against the maker, to all equities arising out of the note transaction itself; but not to a set-off in respect to a debt due from the indorser to the maker of the note, arising out of collateral matters." In the present case, the arbitrator had found that the transaction with respect to the note was independent of all other transactions between the maker and the payee. In that case, Mr. Justice *Bayley* said, "On discussion of the matter with my Lord *Tenterden* and my learned Brothers, I agree with them in thinking, that the indorsee of an overdue bill or note is liable to such equities only as attach on the bill or note itself, and not to claims arising out of collateral matters."

(a) 10 B. & C. 558; 5 M. & R. 296.

The only difference between that case and the present was, that it did not there appear whether the plaintiff had notice of the claims between the original parties, independent of the note. But according to the language of the Court in that case, such knowledge was immaterial. The plaintiff had a right to advance to the full amount of the note, although he might know that other claims existed between the maker and payee. Next as to the previous cases, none of them were inconsistent with the view which was now taken. In *Brown v. Davies* (a), the marginal note was, "where a promissory note has been indorsed to the plaintiff after it became due, who sues the maker upon it, the latter is entitled to go into evidence to shew that the note was paid as between him and the original payee, from whom the plaintiff received it." There Lord *Kenyon* said, in speaking of the note, "if it appeared to have been noted for non-payment at the time the plaintiff received it, that ought to have awakened his suspicion and led him to make further inquiries into the goodness of the note." There, the note was overdue, here it was not. The principle of the decision in that case was, that if a party takes an over-due promissory note, he must inquire what are the equities upon that note before he takes it; but that cannot make it necessary for him to inquire into matters independent of the note. In *Boehm and Others v. Sterling and Others* (b), the marginal note was, "where the drawers of a banker's check, issued nine months after it bore date, upon a consideration which afterwards failed, as between them and the persons to whom they delivered it, they cannot be permitted to object this circumstance in an action brought by a subsequent holder for a valuable consideration and without notice, though, by the general rule, any person receiving a negotiable instrument after it is due, is deemed to have taken

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(a) 3 T. R. 80.

(b) 7 T. R. 423.

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it upon the credit of the person from whom he received it, and subject to the same equities as between him and the parties sued on such instrument." There the Court would not even allow the equities on the note itself to attach. This case supported the previous doctrine, which shewed, that the disposition of the Courts was to limit and not to extend the equities on the note itself. The case of *Collenridge v. Farquharson* (a) was confirmatory of the same principle. In *Barrough v. White* (b), the marginal note was, "where in an action by the indorsee against the maker of a promissory note payable with interest on demand, the plaintiff having proved that he gave value for it, the defendant tendered evidence of declarations made by the payee, when the note was in his possession, that he, the payee, gave no consideration for it to the maker: held, that this evidence was inadmissible, as the plaintiff could not be identified with the payee, and the note could not be treated as overdue at the time of the indorsement." That case sufficiently shewed that the promissory note could not be considered as overdue. On the authority of these cases it was contended, that the present rule ought to be discharged.

Goulburn, Serjt., and *N. Clarke*, in support of the rule, submitted that the case of *Burrough v. Moss* was distinguishable from the present. In that case, it did not appear that any notice of the state of the accounts between the maker and payee had been given to the plaintiff. But in the present case, he had received such a notice previous to his making the advances, concerning which, the present contest arose. There, the question was, whether the mere fact of the note being over due at the time of indorsement was sufficient ground for inferring notice to the indorsee of the state of accounts between the original

(a) 1 Stark. N. P. C. 259. (b) 6 D. & R. 379; 4 B. & C. 325.

parties to the note. There it was taken for granted, that if the plaintiff had notice, he can be in no better situation than the person who originally took it. In the case of *Brown v. Davies*, already cited, it appeared that the knowledge of the note being overdue was clearly conveyed to the indorsee, from the fact of the noting for non-payment appearing on the face of the instrument. There, Mr. Justice *Ashhurst* said, "I think the rule laid down by my Brother *Buller*, in the case in *Cornwall*, is a very safe and proper one; that where a note is overdue, that alone is such a suspicious circumstance as makes it incumbent on the party receiving it, to satisfy himself that it is a good one, otherwise much mischief might arise." The case referred to by Mr. Justice *Ashhurst* was mentioned in the note to the case of *Brown v. Davies*. The name of the case was *Taylor v. Mather*. That was an action by the indorsee of a promissory note against the maker. The note was indorsed some time after it was due, and there were many circumstances which led the Court and jury to conclude that it was fraudulently obtained; whereupon a verdict was found for the defendant. Upon a motion for a new trial, it was refused upon the merits; and Mr. Justice *Buller* at the same time said, "It has never been determined that a bill or note is not negotiable after it becomes due; but if there are any circumstances of fraud in the transaction, and it comes into the hands of the plaintiff by indorsement after it is due, I have always left it to the jury, upon the slightest circumstance, to presume that the indorsee was acquainted with the fraud." The same principle was pointed out in *Boehm and Others v. Sterling and Others*, already cited. In *Tinson v. Francis (a)*, the marginal note was, "although the *bond fide* holder of a promissory note, made without consideration, himself gave a full consideration for it; yet if he took

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(a) 1 Camp. 19.

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it after it was due, from an indorser who had given none, he cannot maintain an action against the maker." The principle of all these cases was, that the indorsee of a promissory note could not recover against the maker, where no consideration had been given, if he had knowledge of such want of consideration. Here, the payee of the note, at the time he indorsed it, stood in the same situation as if no consideration had been given for it, and with a knowledge of that fact, the plaintiff had it indorsed to him. He therefore came within the principle affecting the indorsee of an overdue bill of exchange.

COLERIDGE, J.—According to your argument, however, it makes no difference whether the bill is overdue or not.

Goulburn, Serjt., and N. Clarke, admitted that such was the effect of the argument. The question in the case now was, whether, under the circumstances disclosed in the award, the present plaintiff was entitled to recover. If the action had been brought on the promissory note by *B. B.* himself, the defendant would have had a good defence by a plea of set-off. Then could the present plaintiff, who had taken the note after it was due, with a knowledge of *B. B.*'s liability to the defendant, recover upon the note? It was not suggested that any moral fraud existed on the part of the plaintiff, but according to the finding of the arbitrator, legal fraud existed on his part, and therefore he was not entitled to recover.

Cur. adv. vult.

COLERIDGE, J.—In this case a rule was obtained, calling on the plaintiff to shew cause why this cause should not be referred back to the same arbitrator to direct a verdict to be entered for the defendant, or to reduce the damages to 22*l.* 10*s.* The arbitrator has directed a verdict to be entered for the plaintiff for 171*l.* 10*s.* beyond 270*l.* paid

into Court, and under a power reserved to him has found the following special facts:—The plaintiff sued as indorsee of a promissory note for 352*l.* and lawful interest, dated 25th *March*, 1830, and made by the defendant, payable on demand to *B. B.* or order. The plea denied any damages beyond 270*l.* (paid into Court), and the defendant gave notice to prove the consideration for the indorsement. The note was given for a valuable consideration, and was a separate transaction, independent of any other dealings between the parties. On the 5th of *September*, 1831, the plaintiff advanced to *B. B.* 150*l.*, and on the 29th of *January*, 1833, 100*l.* on the deposit of the note; on the 16th of *August*, 1833, notice was given to the plaintiff that *B. B.* was indebted to the defendant in a sum exceeding the note and interest; and, at that time the defendant did not dispute the plaintiff's lien to the extent of 250*l.* and interest, nor did the plaintiff claim any thing beyond. After this, *B. B.* indorsed the note to the plaintiff, and at the time of the action brought, *B. B.* was indebted both to the plaintiff and the defendant in sums exceeding respectively the amount of the note and interest.

Upon these facts, the plaintiff contends, that the note being payable on demand, and no demand having been found, cannot be considered as having been overdue at the date of the indorsement; and that even if it be so considered, he is bound only by such equities between the payee and maker as arise upon the note itself; that a set-off between these parties arising from the altered state of their general accounts is not such an equity, the note having been given upon a separate transaction, and remaining specifically unpaid. For this latter point, the case of *Burrough v. Moss* (a) is relied on, in which the distinction was taken between the claim of the maker of a note to avail himself of a defence founded on the general state of

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(a) 10 B. & C. 558.

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the accounts between himself and the payee, and his right to avail himself of circumstances, such as actual payment, release, &c., which affect directly the demand on the note itself. The grounds for this distinction, when considered with reference to the circumstances before the Court, are sound and obvious; and the case appears to decide no more than this, that, from *the mere fact* of the note being indorsed when overdue, the indorsee is only put to inquire, and therefore shall only be presumed to know the state of the transaction as to the note itself, and is only identified with the party under whose title he takes it, to that extent. The maker, therefore, was not allowed to transfer that set-off, which would have been available for him against the payee, arising from the general debt due from the payee to him, to meet the demand which the holder had against him on the instrument itself.

In the present case it may be taken in favour of the plaintiff, that the note was not overdue at the date of the indorsement; and it must be taken against him, that he had notice of the state of accounts before he made any of the advances now in dispute. The intended effect of that notice was, that, as between the payee and maker, the note was no longer available, that as between them that which was tantamount to payment had taken place; and, therefore, that any further advance upon the note must be on the credit of the payee only.

It is but reasonable that this notice should have the effect intended, and although the law is adverse to any thing which goes to fetter the negotiability of bills of exchange or promissory notes, I am not aware of any principle in it, which will prevent the notice having operation here. This is not the case of a note or acceptance originally given for accommodation, and without consideration, in which case the accommodation maker or acceptor may have no right by notice to prevent a party from giving consideration, and suing on the note or bill; because such

notice is a direct contravention of his original undertaking. Here, the note for all beyond the sums advanced on the deposit may be considered a new note, made for a valuable consideration, and satisfied, before the second holder has given any consideration for its indorsement; it is therefore no more in contravention of its original purpose, by a notice to restrain its further circulation, than it would have been, if after payment, it had remained by accident or fraud in the hands of the original payee, and he were contemplating to re-issue it. The same principle which in the case of overdue bills without actual notice limits the liability of the acceptor to the extent of the knowledge which the law presumes, must, as it appears to me, in the case of actual notice, whether the bill be overdue or not, limit the liability to the extent of the actual notice. The fact of indorsement is not material on this question, the holder had a right to insist on that, and it was the duty of *B. B.* to give it, for the purpose of enabling the holder to reap the fruits of his undisputed lien.

Upon the grounds, therefore, that the maker might lawfully give the notice in question, that it was given in due time, and that the plaintiff must be taken to have made every subsequent advance upon the credit only of the indorser, I am of opinion that this award ought to be reformed by reducing the damages by the amount of such advances. But the arbitrator has found that 22*l.* 10*s.* are due to the plaintiff in respect of interest on the prior advances: to the extent of those advances it was not disputed that the plaintiff's claim was good; and it is not therefore now open to the defendant to contend, if under any circumstances such contention could be successfully made, that any notice of such lien to him was necessary; and if the plaintiff's claim be good to that extent, it will be good also for this accruing sum. I think, therefore, the verdict should only be reduced, not set aside.

Rule absolute accordingly.

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HINCHLIFFE v. JONES.

An application to make a Judge's order a rule of Court, and for an attachment for disobeying it, may be made on the same motion.

WIGHTMAN moved for an attachment against the sheriff, for not returning a writ pursuant to a Judge's order made in vacation. The order had not been made a rule of Court. He cited the case of *Howell v. Bulteel* (a), for the purpose of shewing that the attachment might be obtained without making the order a rule of Court.

COLERIDGE, J.—That case only decided, that the application to make the Judge's order a rule of Court, and for an attachment, might be made on one motion. There must, however, be a rule for each. The order must be made a rule of Court, or I have no jurisdiction to grant an attachment.

Wightman then altered the terms of his application, and moved to make the order a rule of Court, and for an attachment for disobedience of it.

Rule granted accordingly (b).

(a) Ante, p. 99.

for making the Judge's order a

(b) By the terms of 13 Reg. Gen. M. T., 2 Will. 4, such a rule

rule of Court, need not be served. Ante, vol. 1, p. 474.

DOE d. GRIMES v. ROE.

Special service in ejectment.

CROWDER moved for judgment against the casual ejector, on an affidavit, which stated the following circumstances. The tenants in possession were three sisters. It was not sworn that they were joint tenants. The service was on two on the premises, and a copy left for the third, with the usual explanation. No acknowledgment was

made by her, that the declaration had ever come to her hands. He cited *Doe d. Wetherell v. Roe (a)*.

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COLERIDGE, J.—You may take a rule *nisi*. The service to be at the dwelling-house, where the three sisters live.

Rule *nisi* accordingly.

(a) Ante, vol. 2, p. 441.

Ex parte ELIZABETH MAXWELL.

MANSEL moved for a rule to shew cause why an attorney of the Court should not deliver up certain documents detained by him from the applicant. It appeared on the affidavit of the latter, that some time since, certain business was done in the office of the attorney, on account of *Mrs. Maxwell*. She took out a summons to tax his bill, but at the appointment before the Master, she refused to proceed with the taxation until the attorney appeared. Subsequently an action was brought to recover the amount of the bill of costs, and the attorney was nonsuited, on the ground, that the business had been transacted by the clerk of the attorney, without the latter attending to it. Certain documents had, however, come to the hands of the attorney in the course of these transactions, and it was to compel him to give them up, that the present application was made.

If a party successfully resists an action by an attorney plaintiff for costs, on the ground of his never having been employed as his attorney, he cannot afterwards summarily compel the attorney to give up documents which have come to his possession in the course of the business, for doing which the action was brought.

COLERIDGE, J.—After treating the attorney, when the action was brought, as a person who was not your attorney, you cannot now be heard to allege that he is, and therefore compel him, summarily, to deliver up these documents.

Rule refused.

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DOE *d.* GREAVES *v.* ROE.

The practice of allowing judgment to be signed against the casual ejector, where the term in which the appearance is required, and before which the service has been effected has elapsed, in the following term, only applies to country causes.

MANSEL moved for judgment against the casual ejector. The affidavit on which he applied stated, that the service had been effected in *Hilary* term last. The notice at the foot of the declaration required the appearance to be made in *Easter* term. The whole of *Easter* term had been allowed to pass without applying for judgment against the casual ejector. No objection to this motion in the present term existed, as only one term had been allowed to pass since the service. He cited *Doe v. Roe* (a), and *Doe v. Roe* (b). The present was a town cause. It did not appear by the reports cited, whether the venue in those causes was in town or country.

COLERIDGE, J.—Although it does not appear by the reports, that the causes were country causes, yet it must be taken that they were. The practice recognized in those cases only applies to country causes. The lessor of the plaintiff in a town cause might serve a fresh ejectment, and still not be delayed so much as the lessor in a country cause would, if judgment were not allowed to have been signed under the circumstances mentioned in those cases. No rule therefore can be granted.

Rule refused.

(a) Ante, vol. 1, p. 495.

(b) Ante, vol. 2, p. 196.

Ex parte HULME.

Admission of attorney without a term's notice, under particular circumstances, for the purpose of practising in *New South Wales*.

SIR WILLIAM FOLLETT moved to admit a clerk, without a term's notice, under the following circumstances.

He had served the five years regularly, but had not been able, after the expiration of his articles, to give the usual notice for a term previous to his application. In *Easter* term last, his father obtained an official appointment in *New South Wales*, and he was desirous of going with him to that country, to practise as an attorney, which could not be allowed unless he had been admitted in one of the superior Courts here. Notices in the usual places had been put up, stating the intention of the clerk to make a special application in the present term. He had also, on the 5th of *May*, served notice of his intention to apply for admission, on the secretary to the *Law Society*.

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COLERIDGE, J.—He may, under the circumstances, be admitted on the last day of the present term, his notices continuing up until that day.

Admitted accordingly.

REX v. PILGRIM.

(Before the four Judges.)

M. D. HILL moved for a writ of *habeas corpus ad testificandum*, to bring up the defendant from out of custody, on a charge of felony, for the purpose of taking him as a witness before the *Ipswich* Election Committee, where it was sworn he could give material evidence. He cited the case of *The matter of Sir Edward Price*, a prisoner (a). He contended, that on the authority of that case the Court would be entitled to issue the writ. The only question then was, whether the rule for the *habeas corpus* should be absolute in the first instance.

The rule for bringing up a defendant from criminal custody on a *habeas corpus ad test.* is nisi only in the first instance.

LITLEDAL, J. (b).—The rule cannot be absolute in

(a) 4 East, 587.

(b) Lord Denman, C. J., was absent.

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the first instance, if we can grant the application. You may take your rule *nisi*, to be served on the gaoler, the Attorney-General, and all the persons at whose instance the defendant may be detained.

Rule *nisi* accordingly.

In Excheq. v. Pilgrim, 2. H. L. Dec. 80.

FRODSHAM v. RUST.

The insolvency of the plaintiff after the commencement of the action is not an answer to a motion for judgment, as in case of a nonsuit.

S. HUGHES shewed cause against a rule *nisi*, obtained by *Archbold*, for judgment as in case of a nonsuit. The affidavit on which he proposed to answer the application stated, that the plaintiff had become insolvent since the commencement of the action. A sufficient excuse, therefore, was furnished for not proceeding to trial.

Archbold, in support of the rule, contended that no excuse was furnished by the insolvency of the plaintiff since the commencement of the action. The defendant was entitled either to have the rule made absolute, or to have a peremptory undertaking.

COLERIDGE, J.—The defendant is entitled to judgment as in case of a nonsuit, unless the plaintiff gives a peremptory undertaking.

The rule was discharged, on the plaintiff giving a peremptory undertaking.

GOULD, clerk, v. WILLIAMS.

S. HUGHES shewed cause against a rule obtained by *Comyn*, for having the bail-bond delivered up to be cancelled on the defendant's entering a common appearance, on the ground that the debt for which the action was brought, and for which the defendant had been arrested, was one from which he had been freed by his discharge under the Insolvent Debtors' Act, 7 Geo. 4, c. 57. The facts as they appeared on the affidavits were these. The plaintiff, who was a clergyman, had, in the year 1831, given to the defendant a bill of exchange for 330*l.* to get discounted; the defendant did get it discounted, but appropriated the proceeds to his own use, and the plaintiff was obliged to pay the bill when it became due. In the following year, the plaintiff finding that the defendant was in custody, lodged a detainer against him for the amount of the bill, but the defendant compromised the action by giving a cognovit for the principal, interest, and costs, amounting to 423*l.* 2*s.*, payable by instalments. In 1833, the defendant petitioned the Insolvent Court to be discharged from his debts, and he put the plaintiff's name in the schedule as a creditor for 208*l.* only. Notice of opposition was given on the part of the plaintiff, and it was then agreed between the defendant and *Rawlings*, (the then agent of the plaintiff), that the former should give bills immediately after his discharge for the amount of the debt due, according to the terms of the cognovit, and the defendant's son also gave an undertaking in writing, that his father should accept the bills, and that if he did not, he (the son) would be answerable. The defendant was not opposed, and obtained his discharge, and three days afterwards he voluntarily called upon *Rawlings*, and gave him two bills, dated November 30th, 1833, one at six months for 106*l.*, and the other at twelve months for 122*l.*;

If a bill of exchange is given by an insolvent after his discharge, for a debt included in his schedule, and in pursuance of an agreement made before his discharge, for withdrawing an intended opposition, the defendant cannot be held to bail upon it.

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and in support of the motion it was sworn that 208*l.* was the amount of the debt due from the defendant to the plaintiff at the time of the discharge. On the other side, there were several affidavits, that the debt due by the defendant was 423*l.* The first bill was paid, but the second not being paid, the present action was commenced, and the defendant was arrested. A summons to the same effect as the present motion had been heard at chambers before *Coleridge, J.*, which the learned Judge dismissed, because it was not sworn that the bill was given in respect of the debt inserted in the schedule; that fact was now supplied: it was positively denied, however, by *Rawlings*, that it was, and it was sworn that the two bills were given generally, in respect of the debt of 423*l.* It was therefore contended, that even admitting that a bill of exchange, given in consideration of withdrawing an intended opposition, and for a debt included in the schedule, was void, as being against the policy of the Insolvent Debtor's Act, still that doctrine did not apply to the present case, because there was a larger debt due than that put in the schedule, and therefore *quoad* the difference between 208*l.* and 423*l.*, the defendant was not discharged by the act; and that as it was sworn in answer to the rule that the two bills were not given in respect of the 208*l.* but generally in respect of the 423*l.*, the plaintiff had a right to apply the bill on which the present arrest took place (for the sum of 122*l.* 3*s.* 10*d.*) towards the liquidation of that difference; and that if that fact was at all doubtful, the Court ought not to interfere. *Secondly*, it was contended, that the agreements both of the defendant and his son, being wholly void, for want of any consideration to support them, the giving bills by the defendant, whether in respect of the larger debt, or the smaller one included in the schedule, must be considered in point of law as a voluntary act on his part, he being under no legal obligation to give them, and that it had been frequently decided, that either

a bankrupt or an insolvent might voluntarily after his discharge renew his former liability to its full extent, either by a mere promise or by some binding instrument; and it was argued, that as the act of parliament discharged the defendant's person only and not the debt, if the defendant, after his discharge, chose voluntarily to give a bill for one of the claims in respect of which his person was discharged from liability to arrest, he thereby renewed his liability; and he compared this case to that of a defendant who has been arrested for a debt and who cannot in general be again arrested for the same debt, but if, after being arrested, he gives a new bill for the same debt, he may be again arrested for it upon the new security, for which he cited a late case in the *Exchequer*, of *Hamber v. Cooper* (a). Here the bill was given after the defendant was discharged: it therefore constituted a new debt, and the plaintiff ought not to be deprived of any of the remedies which the law allows to persons holding bills of exchange. The present case might, it was said, be distinguished from those cases which had hitherto been decided upon the construction and policy of the Insolvent Debtors' Act, and that no case had gone the length of the present. In *Kay v. Masters* (b), the promissory note was extorted by duress, for it was obtained from the debtor while he was in custody, by threatening an opposition. In the present case, however, it was positively sworn by *Rawlings*, that the interview which took place between him and the defendant was in consequence of the solicitation of the defendant's wife, and that the defendant himself told him it was his intention that the plaintiff should not lose any part of his debt; in that case also, the whole of the debt was included in the schedule. So, in *Jackson v. Davison* (c), the warrant of attorney was given by the

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(a) Ante, vol. 3, p. 671.

(b) Ante, vol. 1, p. 86.

(c) 4 B. & Ald. 691.

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debtor whilst he was in prison, and before he had obtained his discharge; and the same observation applied to *Rogers v. Kingston* (a). In the late case of *Tabram v. Freeman* (b), where a judgment was set aside which had been signed upon a cognovit given before the defendant's discharge, the Court seemed to have proceeded principally on the ground that the party who held the cognovit was the attorney who prepared the insolvent's schedule, and acted for him as his attorney in obtaining his discharge, and who it was considered had taken an undue advantage of the insolvent's situation by inducing him to allow the debt to be omitted from the schedule, without sufficiently informing his client of the consequences of that omission; and it was to be observed, that that case was opposed by *Howard v. Bartolucci* (c), the marginal note of which case was, "Where A., an attorney, employed by B., an insolvent, to prepare his schedule, omits, with her privity, to insert his own debt: *Semble*, that this is not such a fraud as will destroy A.'s right of action against B. for the non-payment of such debt (d)." *Murray v. Reeves* (e) was an action on the agreement, the consideration of which was, the withdrawing the opposition, and the Court held the agreement void. So here, no action would lie on the agreement, as it must be admitted that it was void, but being void, the defendant was under no obligation to give the bills, and he must be taken to have given them voluntarily, and as it was expressly denied that the whole debt was put in the schedule, the Court ought not to interfere, especially as the defendant, if there was any fraud, participated in it.

(a) 2 Bing. 441; 10 J. B. Moo. 97.

(b) Ante, vol. 2, p. 375.

(c) 1 Nev. & M. 69.

(d) It appears, however, from 6 Car. & Pay. 13, that on the second trial of this cause, the jury again found for the defendant, and no

attempt was made to disturb the verdict. It was left to the jury to say whether the omission of the debt was by the plaintiff's procurement.

(e) 2 Man. & Ry. 423; 8 B. & C. 421.

Comyn, contra, was stopped by the Court.

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COLERIDGE, J.—I think the present rule must be made absolute. Notice of opposition, it appears, was given by the plaintiff, and on the 18th, the day before his discharge, a proposition is made by the defendant, that if the plaintiff will not oppose him, he will give a bill for the amount of the debt, and that his son will guarantee the payment of it. The opposition is withdrawn, and a few days after the defendant's discharge the bill in question is given. It is impossible to resist the conclusion, that the bill was given in consequence of an agreement on the part of the plaintiff to withdraw his opposition. These being the facts, let us apply the law to those facts. It is the principle of the cases decided on this point, that an agreement to withdraw an opposition, on condition of receiving security for the debt, is in direct contravention of the provisions of the Insolvent Act. The reason is, that such an agreement is contrary to the interest of the creditors, because it prevents the opposing creditor from coming before the Court, and thus stops that full examination which it is the policy of the Insolvent Act to institute. Under these circumstances, I think the bail-bond in the present case ought to be given up to be cancelled, the defendant entering a common appearance.

Rule absolute, without costs (a).

(a) See *Simpson v. Pogson*, 3 D. & R. 567.

DOE d. PALMER and Another v. ROE.

S. HUGHES shewed cause against a rule obtained by *Steer*, requiring *Charles Salisbury Butler*, an attorney of

The Court has
no direct power
to order an attorney's bill to

be taxed, independent of 2 G. 2, c. 23.

The Court cannot direct a bill to be taxed at the instance of any person but the client.

If various matters form but one transaction, some being at law, and others for conveyancing, one bill only ought to be made out.

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the Court, to shew cause why the several bills of costs in this cause, and all other matters delivered by him to *William Henry Fosbrook* and *Philip Leigh*, should not be referred to the Master to be taxed; and why he should not refund such part of the whole sum paid to him upon those bills as might be deducted on taxation. The facts, as they appeared on the affidavits, and to which the attention of the Court must be directed in order to decide on the present rule, were the following:—*Fosbrook*, whose name was mentioned in the rule, had become the assignee of a lease of certain premises, which he had formerly rented as a yearly tenant under *John Butler*, but latterly as tenant to a Mr. *Palmer*. Upon this lease, *Leigh*, the attorney of *Fosbrook*, had made some pecuniary advances to him. Subsequently, the covenants of the lease having been broken, and *Fosbrook* having abandoned the premises, *Palmer* instructed his attorney, *C. S. Butler*, to commence an action of ejectment to recover possession, and a declaration in ejectment was accordingly stuck up on the premises on the several demises of *Palmer* and *John Butler*. *Leigh* then commenced a negotiation with the landlord, *Palmer*, respecting the premises, alleging that he should lose his money if the ejectment was proceeded with, and in the end, *Palmer*, the landlord, consented that proceedings in the ejectment should be stayed, upon *Leigh's* undertaking to perform the covenants which had been broken, and upon his paying the costs incurred in the ejectment, and upon *Fosbrook's* surrendering the lease in favour of *Leigh*, and upon the latter taking a new lease in his own name. *Leigh* having agreed to these terms, the bill of costs in the ejectment suit was made out by *C. S. Butler* to Mr. *Palmer*, and was delivered to *Leigh*, who paid it, and he then entered into a written agreement with *C. S. Butler* on behalf of Mr. *Palmer*, to take a new lease on the terms proposed, and to pay all the costs occasioned by the surrender of the old lease, and the grant of the new one; this agreement

and the surrender were prepared by *C. S. Butler*, who delivered his bill to *Leigh*, and the second bill, amounting to 1*l.* 13*s.*, was also paid by *Leigh* when the deed of surrender was executed by *Fosbrook*. The third bill delivered to *Leigh* was for the expenses of the lease, amounting to 16*l.* 18*s.* 2*d.*, and which was also paid by *Leigh*. The last bill was for the registry, memorial, &c., 4*l.* 18*s.* 4*d.* These latter bills were made out by *C. S. Butler* to Mr. *Leigh*; but at the request of the latter, *Fosbrook's* name was substituted at the head of the bills for *Leigh's*. When the business was completed, and the new lease to *Leigh* was executed by Mr. *Palmer*, *Leigh*, for the first time, requested that the bills should be taxed, and this being refused, he took out a summons for that purpose, which was heard before Mr. Justice *Bosanquet* at Chambers, and it was alleged by *Leigh* that the application was on behalf of *Fosbrook*, and that he acted as his attorney. Ultimately his Lordship made an order that the first bill only, for the costs of the ejectment, should be taxed. No order, however, was drawn up by *Leigh*, but, after allowing *Easter* term to pass by, he again applied to this Court, that all the four bills might be taxed together, although a considerable length of time had elapsed since the payment of the bills. It was now contended that the Court had no power to order any of these bills to be taxed, and that the order of Mr. Justice *Bosanquet* could not be supported. In order, it was said, to determine whether the Court could interfere, it was necessary to refer to the language of the 2 *Geo.* 2, c. 23, s. 23; for since the case of *Dagley v. Kentish* (a), which overruled *Wilson v. Gutteridge* (b), it must be considered that the Court had no power to direct an attorney's bill to be taxed, except under the statute: and from the language of that section it was clear, that the

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(a) 2 B. & Adol. 411; ante, vol. 1, p. 330, S. C.

(b) 4 D. & R. 736; 3 B. & C. 157.

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Court could only refer an attorney's bill for taxation where the relation of attorney and client existed, and where the business was done in the Court to which application was made. *Clutterbuck v. Coombes* (a) and *Enfield v. King* (b). In the present case no such relation existed. The real client of the attorney was Mr. *Palmer*, who gave the instructions for the action of ejectment. Mr. *Leigh*, by whom the bills were paid, did so in furtherance of the arrangement made with Mr. *Palmer*. The case of *Langford v. Nott* (c) was in support of this principle. That was a petition for the taxation of a solicitor's bill of costs, which had been paid by the petitioner. The business had been done for other parties, for whose costs the petitioner had ultimately become liable. Mr. *Heald*, in opposing the petition, contended, that the costs not having been incurred in business done for the petitioner, it was not competent to him, after payment, to apply for taxation. There the Master of the Rolls said, "Do you remember any instance of extending the jurisdiction to cases not between a solicitor and client? The other party may, in the regular course, resist the payment; but if, for the sake of dispatch, he chooses to pay the bill, can he afterwards apply to have it taxed as between solicitor and client? I think the act of 2 Geo. 2, c. 23, s. 23, does not apply to such cases. If upon a compromise, the one party agrees to pay the bill of the solicitor employed by the other, it cannot be said, that that makes him his solicitor." Again, in the case of *Storie v. Lord Bective*, mentioned in the note to the same case, it appeared that the defendant agreed upon a compromise to pay the bill of the plaintiff's solicitor, amounting to 289*l.* 8*s.* 8*d.* About a year after the payment, the defendant petitioned for a taxation of the bill, stating it to contain fraudulent charges. The Master of

(a) 5 B. & Adol. 400; 2 Nev. & Mann. 209, S. C.

(b) 3 Nev. & M. 437.

(c) 1 Jac. & W. 291.

the Rolls dismissed the petition on the ground that the payment of the bill had formed one item in a general agreement between the plaintiff and defendant, which could not be disturbed in part. So, in the present case, a valuable lease had been obtained by Mr. *Leigh*, which it was sworn he had said was worth 200*l.* to him, and no stipulation was made about the costs being taxed, nor was it ever intended that they should be taxed; it would be, therefore, unjust to order these bills to be taxed, for it would be disturbing the agreement of the parties, and allowing one of them to take an unfair advantage. In this case a decision consistent with the last had been pronounced by the Master of the Rolls. There were other cases apparently varying from this principle; but when they came to be examined, it would be found, that, however the circumstances might vary under which the attorney's bill was allowed to be taxed, it was either at the instance of the client himself or of some person standing under the particular circumstances of the case in his situation. That remark might be made of *Grover v. Heath* (a), *Vincent v. Venner* (b), *Sadler v. Palfreyman* (c), and *Balme v. Power* (d). The same principle required, that, in order to enable the Court to exercise a summary jurisdiction over an attorney, the relation of attorney and client must exist. On that principle the Court had acted in the cases of *Ex parte Crisp* (e), *Ex parte Jones* (f), and *Gray v. Kirby* (g). But supposing the Court should be of opinion that the bills in this case ought to be taxed, it was now too late to make the application, as the bills had been paid, and three months had since elapsed. The Court never allowed taxation in such a case, without specific proof either of fraud or gross

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(a) Ante, vol. 2, p. 285.

(b) 1 Mylne & K. 212.

(c) 3 Nev. & Maun. 599.

(d) Jacob's Reps. 305.

(e) Ante, vol. 2, p. 455.

(f) Ib. 161.

(g) Ib. 601.

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overcharge. *Gretton v. Leyburne* (a), *Wilkinson v. Foster* (b). Here there is no allegation of either in the affidavits; on the contrary, it is alleged in Mr. *Butler's* affidavits that the charges are fair and usual; and *Drax v. Scroope* (c) shews, that even though an attorney's charges may appear to be unreasonable, yet, if the charges are made in pursuance of an express agreement between the parties, the Court will not interfere. It was further contended, that, as an order had already been made for taxing the first bill, which was the only one which contained common law charges, the Court would not now interfere, unless it was shewn clearly, that the first bill was taxable at the instance either of *Leigh* or *Fosbrook*, and that all the bills were to be looked upon as one. No case, it was said, had gone that length, for here the first bill was incurred on the credit of and made out to Mr. *Palmer*, who alone could have been sued by *Butler* for the amount; and the other bills, which were for conveyancing only, and contained no taxable item, were incurred on the responsibility of *Leigh*, who alone was liable by virtue of the written agreement, and therefore there was no connexion between the first bill and the others. *Luxmore v. Lethbridge* (d) was different, because there, all the bills were incurred on the credit of the same client, and in the course of his general business, and therefore in that case there was no reason for sending in several bills.

Steer, in support of the rule, contended, that, under the circumstances of this case, the relation of attorney and client must, for all purposes contemplated by the statute, be considered as having been created by the arrangement between the parties. But, independent of the statute, the Court must be considered as having a jurisdiction over the

(a) 1 Turn. & Russ. 407.

(c) 2 B. & Adol. 580.

(b) 7 J. B. Moore, 496.

(d) 5 B. & Ald. 898; 1 D. & R. 511.

attorney as an officer of the Court, and therefore possessing the power to order his bill to be taxed.

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COLERIDGE, J.—This was a rule calling upon *Charles S. Butler* (an attorney of this Court) to shew cause why the several bills of costs in this cause, and all other matters delivered by him to *W. H. Fosbrook* and *P. Leigh*, or either of them, should not be referred to the Master to be taxed. The affidavits were contradictory as to many circumstances, but the material facts, on which my judgment will proceed, are very clear. *Fosbrook* was under-lessee for a long term of certain premises, which he had originally rented under *John Butler*, and upon which *Leigh*, who was an attorney, had advanced money. The covenants of the lease were broken, and *J. Butler*, or his assignee *Palmer*, had commenced an action of ejectment to recover the possession. *Charles S. Butler* was the attorney in that action for the lessors of the plaintiff.

In this state of things a negotiation was opened on the part of *Fosbrook* and *Leigh*, in which the latter was the principal ostensible party, and of which he was to keep the greater share of the benefit, but it was for the benefit of both. The result was, that the action was stopped on the terms of paying the costs of the lessors of the plaintiff, the surrender of the lease by *Fosbrook*, and the grant of a new lease to *Leigh*.

The bills in question, four in number, and separately delivered, arose out of this treaty, and were as follows:—

	£	s.	d.
Costs of ejectment	10	15	0
Surrender of lease, and agreement for new lease	13	13	0
New lease	16	18	2
Registry, memorial, &c.	4	18	4
	<u>£46</u>	<u>4</u>	<u>6</u>

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These bills have been paid, and it was much discussed, whether *Fosbrook* or *Leigh* were the party charged by *Charles S. Butler*, and paying. I think that as between him and *Fosbrook*, the latter must be taken to be that person, whatever private understanding there may have been between *Butler* and *Leigh*; and, further, I think that substantially the whole must be considered as one transaction, and that the four bills should have been delivered as one.

These facts, therefore, raise the question, whether the Court has any power to refer to taxation an attorney's bill, at the prayer of any one but the client. It may now be considered as settled, that the Courts have no general inherent power to order the taxation of an attorney's bill. Such a power was asserted in *Wilson v. Gutteridge* (a); but it was doubted by all the Judges, on a consultation with them, in the case of *Dagley v. Kentish* (b), and it was denied in *Clutterbuck v. Combes* (c), and in *Ex parte King* (d). It should be observed, that there is nothing in these decisions, which at all interferes with the general power of the Courts to call their officers to account, upon any charge of extortion, or misconduct in the course of their practice.

These decisions, however, shew that a direct application to refer a bill to taxation, must proceed upon the statute 2 Geo. 2, c. 23, s. 23. Now it should seem by that section, that the taxation of a bill is consequent only upon the delivery of it signed—and this delivery is to be to the party to be charged therewith, upon whose application the taxation is to be ordered. The party to be charged therewith appears clearly, from the language and intention of the whole section, to be the original employer or client, upon whose retainer the employment was undertaken. Accordingly, in *Langford v. Nott* (e), upon a pe-

(a) 3 B. & C. 157.

(d) 3 N. & M. 437.

(b) 2 B. & Ad. 417.

(e) 1 Jac. & Walker, 291.

(c) 5 B. & Ad. 400.

tion for the taxation of a solicitor's bill of costs, which had been paid by the petitioner, but the business for which had been done for other parties, for whose costs the petitioner had ultimately become liable, the Master of the Rolls (Sir *T. Plumer*) thought there was no instance of extending the jurisdiction to cases not between solicitor and client; and he observed, that if, upon a compromise, the one party agreed to pay the bill of the solicitor employed by the other, it could not be said that that made him his solicitor.

In the present case, *Charles S. Butler* could have delivered no bill, nor maintained any action for his costs in the action of ejectment against *Fosbrook*: if *Fosbrook* had defended the action, until judgment had passed against him, he would have paid the costs, taxed as between party and party; but he cannot entitle himself to tax it as between solicitor and client, because he has agreed as one term of a compromise to pay it, the bill being directly due from the lessors of the plaintiff.

I am of opinion, therefore, that the objection made at the bar against the power of the Court to direct the taxation of the bill of costs, must prevail; and if that be so, there is nothing of a taxable nature to connect the three other bills with, so as to render them subject to taxation, to which in their own nature they are not liable.

A case was cited of *Storie v. Lord Bective*, to be found in a note to the case of *Langford v. Nott*, in which the defendant agreed upon a compromise to pay the bill of the plaintiff's solicitor; about a year after payment, he petitioned for a taxation, stating the bill to contain fraudulent charges. The Master of the Rolls dismissed the petition, on the ground that the payment of the bill had formed one item in a general agreement between the plaintiff and defendant, which could not be disturbed in part. This dismissal did not proceed apparently on a supposed want of jurisdiction, but it is an authority in point of discretion in

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the present case. The amount of the charges in these bills is not perhaps satisfactory; but the whole arrangement was one by which a forfeited lease was renewed, and if, as was contended, *Leigh* either overstepped his authority, or sacrificed the interest of *Fosbrook* to his own, the remedy should be sought against him; while, if a case of fraud or extortion can be established against *Butler*, he may still be made amenable to the Court.

This case might, perhaps, have been disposed of on the ground of delay; it appears that a similar application was made to my brother *Bosanquet* in *February* last at chambers; and an order was made by him referring *only* the first of the beforementioned bills to taxation. That order was, however, never drawn up, and no satisfactory reason was assigned for that, for renewing the application at all, or after so long an interval.

I think, however, the rule must be discharged on the grounds first stated.

Rule discharged.

UNDERDEN v. BURGESS.

The sheriff will be allowed his costs of keeping possession after applying to the Court where it is for the benefit of the parties, and not in furtherance of his duty.

THIS was a sheriff's interpleader rule.—*R. V. Richards* appeared for the execution creditor; *Hoggins* for the claimant; *Swan* for the sheriff. The venue in the action was *Staffordshire*. The sum in dispute only amounting to about 40*l.*, at the suggestion of the Judge it was referred to the Master, to ascertain who was the owner of the property, the goods not to be sold, and the sheriff to keep possession.

Swan, on behalf of the sheriff, applied to be allowed the costs of keeping possession until the Master had determined the question between the parties. Were it not for

the agreement between the parties, the sheriff would proceed to sell.

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COLERIDGE, J.—If the sheriff were to sell, he must give some notice previously. The Master will probably be able to make his report in a few days. The sheriff shall therefore have his costs of keeping possession after a week from the present time, if the Master shall not have sooner made his report.

Rule accordingly.

SAXON v. SWABEY.

KELLY shewed cause against a rule *nisi* obtained by Sir Frederick Pollock, for enlarging a peremptory undertaking. Judgment as in case of a nonsuit had been obtained, and the rule discharged on the plaintiff's giving a peremptory undertaking to try at the sittings after *Easter* term last. On the day when the cause was called on, several cases in the list were unexpectedly referred, so that it came on much earlier than was expected. The plaintiff's witnesses were not in attendance, though his counsel was; and the defendant's counsel were absent, though his attorney and witnesses were in attendance. The plaintiff would not withdraw his record, and the cause was struck out. The present application was made to enlarge the undertaking until the sittings after *Trinity* term, without paying the costs of the day. To this latter term the defendant objected. The plaintiff had undertaken to try on the day in question; he was therefore bound to be prepared to try then, however unprepared the defendant might be.

A plaintiff who has given a peremptory undertaking to try at a particular sitting, is bound to be prepared for that purpose, although the defendant is not ready to proceed.

Sir Frederick Pollock supported the rule, and contended, that the cause having been struck out, both parties must be considered as equally blamable, and therefore

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neither party could be entitled to costs. There was no doubt the plaintiff ought, under the circumstances, to be allowed to try the cause, as by going to the sittings, he had shewed a *bond fide* intention of trying. The only question was, on what terms he ought to be allowed to try. If the Court entered into the question of each particle of blame which attached to either party, in order to determine that question, it would let in an innumerable amount of considerations in each case.

COLERIDGE, J.—I think, that in this case, it is perfectly clear that the plaintiff must be let in to try his cause; as he appears to have had an intention to perform his undertaking. I agree, that a rule ought to be laid down so as to exclude all those nice considerations which might arise in examining into the particular circumstances of each case, where a peremptory undertaking has not been fulfilled. The principle on which I shall decide the case, is this:—the plaintiff has given a peremptory undertaking to try on a particular day. It appears, that he was not in a condition to try. Supposing the defendant had been there, then the plaintiff must have withdrawn the record, or obtained delay on certain terms. But he was not. Then the plaintiff says, that because the defendant was not there to force him on, he was not bound to proceed or to pay the penalty incurred by not proceeding. But I think the better rule to lay down is, that, as the plaintiff has failed in performing his undertaking, he must pay the costs consequent on such failure. If I were not so to hold, all the minute circumstances of each case must be taken into consideration. The present rule must, therefore, be made absolute on payment of the costs of the day, and of this application.

Rule accordingly.

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TWISS v. OSBORNE.

KELLY had obtained a rule, calling on the plaintiff to shew cause why the defendant should not be allowed his costs, pursuant to the statute 43 *Geo. 3*, c. 46, s. 3.

The affidavits upon which the rule was obtained disclosed these facts:—The defendant was arrested and held to bail for the sum of 33*l.* 1*s.*, and, upon the trial of the cause before Lord *Abinger*, C. B., at the last assizes for the county of *Cambridge*, the jury found a verdict for 8*l.* 18*s.* only. By the bill of particulars, it appeared that the sum for which the defendant was arrested was made up of the following items:—

	£	s.	d.
" Balance of accounts - - -	5	5	0
" <i>September</i> 16, 1833—Beer - -	18	0	0
" <i>December</i> 16, 1833—Beer - -	4	16	0
" ————— —10 barrels -	10	0	0
	<hr/>		
	£38	1	0
" 1834, <i>May</i> —Cash received - -	5	0	0
" Balance - -	£33	1	0"
	<hr/>		

On an application for defendant's costs under the 43 *Geo. 3*, c. 46, s. 3, the onus of proving that the arrest was without reasonable and probable cause lies on the defendant, and the Court will not inquire whether the finding of the jury was correct.

In order to obtain costs under the 43 *G. 3*, c. 46, s. 3, it is not necessary to shew that the arrest was malicious.

The plaintiff was a brewer at *Cambridge*, and the defendant a publican in *London*. In *August*, 1833, the plaintiff called upon the defendant in town, and stated that he was desirous of introducing his ale into the *London* market, and requested the defendant to endeavour to establish a sale of it "for him." This the defendant agreed to do, and desired that a sample might be sent. On the 16th of *September*, the plaintiff sent him eight barrels of ale, the price of which formed the item of 18*l.* under that date in the particulars. It was soon discovered that this ale was too bitter for the *London* market, and the defendant complained several times of his inability to dispose of it, when the plaintiff said he would send another sample,

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brewed by a new brewer. On the 12th of *December*, the plaintiff wrote as follows to the defendant:—

“ My waggon will be in town in about fourteen days. I shall send you two half barrels as a sample brewed by a new brewer I have engaged from *London*, who understands the *Scotch* system of brewing. Have the goodness to get the barrels empty by that time, which will oblige yours, &c.

“ *J. P. Twiss.*

“ *Cambridge, Dec. 11, 1833.*”

In a day or two after the receipt of this letter, the defendant sent two barrels of ale, which formed the item of 4*l.* 16*s.* in the particulars. This, however, turned out equally bad and unsaleable. After two or three interviews and complaints, the plaintiff requested the defendant to endeavour to sell it, in the best way he could, “for him,” and said he would take off twelve shillings a barrel, rather than have the expense of taking it back to *Cambridge*. The defendant was unable to dispose of more than four barrels of the ale. On the 30th of *December* last, the plaintiff desired one *Gates*, a carrier, to call on the defendant for “the ten empty barrels” in which the quantities of ale before mentioned had been sent. *Gates* accordingly called on the defendant for that purpose on the 2nd of *January*, but at that time only four of the barrels were empty, and the defendant sent those and also the six full ones to the plaintiff by *Gates*. The carrier delivered them all at the plaintiff’s premises, but he refused to receive them. The plaintiff swore the affidavit of debt on the same day (*January 2*), and the writ was issued on the following day, for the sum of 33*l.* 1*s.*, upon which the defendant was arrested. At the trial, the plaintiff endeavoured to establish a custom to charge for barrels, as between a brewer and his customer, where they had been detained an unreasonable time; but he failed in this, and the learned Judge told the jury to put out of their considera-

tion the item of 10*l.* mentioned in the particulars. The question at the trial was, whether the sale of the ale was an absolute sale, or whether the defendant was to sell it for the plaintiff upon commission. The item of 5*l.* 5*s.* (balance of an old account) was admitted by the defendant, and a set-off for the sum of 1*l.* 7*s.* for some gin sold by the defendant to the plaintiff was admitted by the latter. If the sale were an absolute one, the plaintiff would have been entitled to recover 21*l.* 14*s.*; if not, only 8*l.* 18*s.*; and the jury found for the latter sum. The defendant swore that he never intended to receive the ale as an absolute purchase, and that he believed the plaintiff had no reasonable or probable cause for arresting him.

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Biggs Andrews shewed cause upon an affidavit of the plaintiff, in which he stated that the ale in question was really and *bona fide* sold to the defendant, and that it was not sent as a sample; that he believed the jury were induced to find a verdict for the sum of 8*l.* 18*s.* only, in consequence of their belief that the sale was not absolute; and that it was proved at the trial, that the defendant kept no account of the sale by him of the ale, and never charged any commission for such sale. He contended, that the facts disclosed by the affidavit of the plaintiff shewed a sufficient ground for him to believe that he had a good cause of action for the whole sum. It was not sufficient, in order to entitle a defendant to his costs, that a plaintiff did not, in fact, recover the whole amount sworn to (*a*). A rule like the present was sufficiently answered by shewing that there was a fair and *bona fide* question to try (*b*); and it was for the defendant to shew affirmatively the absence of all reasonable and probable cause. The affidavit of the defendant himself clearly

(*a*) *Roper v. Shevley*, ante, vol. 2, p. 14.

(*b*) *Stovin v. Taylor*, ante, vol. 1, p. 697, note.

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shewed that there was a fair question to try, namely, whether the ale was sold to him, or sent to him to sell on commission; and the circumstance of his not having kept any account of the produce of the goods, or made any claim for commission, was strong to shew that the sale was absolute. With respect to the ten barrels, it was a question of law, whether the plaintiff was entitled to charge for them. In *Stovin v. Taylor (a)*, it was decided, that a plaintiff who arrests a defendant under a misapprehension of a doubtful point of law, is not liable, upon failure, to pay the defendant's costs.

Kelly and Gunning, in support of the rule, were stopped.

COLERIDGE, J.—The Court is not at liberty to go into the question whether the jury had or had not come to a right conclusion in point of fact. It must now take the facts to be as the jury have found them. They have found that the ale was never in fact sold to the defendant. If they have come to an erroneous conclusion, the plaintiff should have taken steps to correct their finding. Still, however, the onus of shewing that there was a want of reasonable and probable cause, lies on the defendant. I think that has been done. The plaintiff recovered only one-fourth of the sum sworn to, and upon which he arrested the defendant. The latter has shewn very satisfactory reasons, to my mind, for the jury's finding such a verdict. It was formerly thought to be necessary for the defendant to shew that the arrest was malicious; but that doctrine is now exploded (b). With respect to the barrels, it is quite clear that in no view of the case could they be considered as sold to the defendant.

(a) Ante, vol. 1, p. 697, note.
 But see *Gompertz v. Denton*, Id. 623.

(b) *Donlan v. Brett*, 10 B. & C. 117; 5 M. & R. 29, S. C.; *Day v. Picton*, 10 B. & C. 120.

The plaintiff has shewn no reason for including them in his affidavit of debt. On the contrary, his own letter, and the circumstance of his sending the carrier for them, shew that he did not consider them as sold to the defendant. The rule must, therefore, be made absolute.

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Rule absolute (a).

(a) See *Hall v. Forget*, ante, *Archer*, 5 B. & Ald. 513; 1 D. & vol. 1, p. 696; *Dronfield v.* R. 67.

COURT OF COMMON PLEAS.

Trinity Term,

IN THE FIFTH YEAR OF THE REIGN OF WILLIAM IV.

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BECK v. MORDAUNT.

In an action on an attorney's bill, the defendant cannot, after being let in to plead to the merits, plead that no signed bill has been delivered.

Quare, whether such a defence can be given in evidence under the general issue.

THIS was an action upon an attorney's bill, in which a regular judgment had been signed, and afterwards set aside on payment of costs, upon an affidavit of merits. The defendant afterwards pleaded that no signed bill had been delivered pursuant to the statute. The plaintiff, after retaining the plea for twenty-two days, obtained an order of Mr. Justice *Park*, at chambers, for striking it out, on the ground that the plea did not raise a defence to which the defendant was entitled after an affidavit of merits. The order was obtained on the authority of *Holmes v. Grant* (a).

W. H. Watson, on a former day, obtained a rule *nisi* to discharge this order.

Stephen, Serjt., shewed cause.—Before the new rules, the defence here attempted to be set up might have been given in evidence under the general issue. But it has, since the making of those rules, been held, that it must be specially pleaded. [*Park*, J.—My opinion is, that it is not necessary to plead such a matter specially, inasmuch as the plaintiff must be nonsuited unless he be prepared

(a) H. T. 1835, Exch.

with proof that the bill was delivered a month before the commencement of the action.] The only question here is, whether this is such a plea as the defendant ought to be allowed to plead after a regular judgment and affidavit to merits.

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Watson, contra.—The delivery of an attorney's bill is material to the protection of the client: it is for this purpose the legislature has required it. A plea of non-delivery, therefore, is a plea to the merits. *Parke, B.*, at the last Assizes at *Durham*, held that the fact of the non-delivery of the bill could not be given in evidence under the general issue. Besides, here, the plaintiff has adopted the plea by retaining it without objection for twenty-two days.

TINDAL, C. J.—It appears to me to be perfectly clear that this is not a plea to the merits. The case of *Holmes v. Grant* is precisely in point. The only effect of the plea, if allowed, would be to render useless the expense the plaintiff has already incurred, and to compel him to commence a fresh action. The defendant having been let in to plead to the merits, he ought not to have put such a plea upon the record. All that can be said on the other side is, that there has been unreasonable delay on the part of the plaintiff in seeking to be relieved from the plea. That might be an answer to the rule if that which is complained of were a mere irregularity. But we are not bound by that delay to prevent the cause from standing in such a position as it ought to stand in upon its merits: this is something more than an irregularity. I therefore think that the rule must be discharged, but, by reason of the delay, without costs.

PARK, J.—I concur in thinking that this case is governed by *Holmes v. Grant*. And I must observe that I am

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far from being convinced that the ruling of Mr. Baron *Parke* was right.

VAUGHAN, J.—I also think this rule should be discharged. But I desire to reserve the consideration of whether or not the defence here attempted to be set up should be specially pleaded.

Rule discharged, without costs.

*See Baily v. Lambing Co. 4 L. R. 235.
 Drew v. Woodcock. 24. L. R. 22.*

SYKES and Others, Executors &c., v. HAIGH.

If an award directs a document to be delivered to three persons, they must all make the demand at the same time, or execute a power of attorney authorizing one person to make it, so that the defendant may know the demand to be made by their joint authority.

TOMLINSON moved for an attachment against the defendant for not delivering a certain bond pursuant to an award. The arbitrator had directed the bond to be delivered to the three plaintiffs. The demand had, however, been made by only one; but an affidavit was made by the other two plaintiffs, stating that they had concurred in the demand being made by the one plaintiff, and that the bond had not been delivered to either of them.

TINDAL, C. J.—You had better have a power of attorney from all three plaintiffs. There may be some reason why the demand was not made by them all. The award gives the plaintiffs a joint right to receive the bond. It ought to be shewn, therefore, that the defendant could know that the demand was made by the authority of all the persons to whom, by the terms of the award, he was bound to deliver the document.

Rule refused.

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DOE d. THOMSON v. ROE.

ATKINSON, on the part of one claiming to be landlord of the premises for which this ejectment was brought (but not shewing how or when he became landlord), after judgment and execution for the lessor of the plaintiff, obtained a rule calling upon the latter to shew cause why the judgment should not be set aside, and he be admitted to defend.

In the absence of a suggestion of collusion between the lessor of the plaintiff and the tenant, the Court will not set aside a regular judgment in ejectment after execution, in order to let in the landlord to defend.

Bompas, Serjt., shewed cause, upon an affidavit negativing collusion between the lessor of the plaintiff and the tenant. He cited *Doe d. Ledger v. Roe* (a) and *Goodtitle v. Badtitle* (b) to shew that the Court will not, after a plaintiff has obtained judgment and possession in an undefended ejectment, without collusion, let in a party to defend who claims to be landlord, or from whom his tenants had concealed the ejectment. The Court, in the last-mentioned case, said: "If the lessor of the plaintiff had colluded with the landlord's tenant, we could have interfered. But here the case is the same as if the tenant had delivered over the possession wrongfully to another person. The landlord must bring an action of ejectment to recover it. How can we deal with the lessor of the plaintiff? he has not been to blame. If your tenant has done you wrong, that is only a matter between him and you."

Atkinson, in support of his rule.—In *Ledger v. Roe*, the landlord was guilty of laches. In *Doe d. Shaw v. Roe* (c) the Court of *Exchequer* set aside a regular interlocutory judgment (signed for want of appearance) and writ of possession executed, on an affidavit by the attorney for the

(a) 3 Taunt. 506.

(b) 4 Taunt. 820.

(c) 13 Price, 260.

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landlord and tenant, that he had received instructions for entering an appearance, but had neglected it, owing to matters personally affecting himself, which had prevented his attending to it.

TINDAL, C. J.—The tenant is bound to deliver the declaration and notice served upon him to the landlord under whom he holds and whom he knows. Here, for anything that appears, the party claiming to be let in to defend may be a devisee of the person under whom the tenants came in, or he may be the lord having the estate cast upon him by escheat. Collusion between the lessor of the plaintiff and the tenant being denied, I think we have no authority to interfere. The cases of *Doe d. Ledger v. Roe* and *Goodtitle v. Badtitle* are decisive. In *Doe d. Shaw v. Roe*, there was a mere slip on the part of the attorney, who had been duly instructed, but had neglected to enter an appearance to the action. The party here claiming to be landlord may bring another ejectment.

The rest of the Court concurring—

Rule discharged, without costs.

INNES v. LEVY.

The fee payable by law to the officer from the party arrested, is 4d. only, the fee prescribed by the 23 Hen. 6, c. 9.

THIS was an action against a sheriff's officer for extortion, under the 32 Geo. 2, c. 28, s. 1, which provides (amongst other things) that "no sheriff, undersheriff, bailiff, &c., shall demand, take, or receive, or cause to be demanded, taken, or received, directly or indirectly, any other or greater sum or sums of money than is or shall be by law allowed to be taken or demanded *for any arresting or taking*, or for detaining, or waiting till the person or persons so arrested or in custody shall have given

an appearance or bail," &c. The sum taken on the arrest of the plaintiff was 1*l*. On the part of the defendant, one of the Masters of the Court of *King's Bench*, who had formerly had considerable practice as an attorney, was called: he proved that he had paid 1*l*. very many times, and had had it allowed on taxation. On the part of the plaintiff, it was contended that 4*d*. was the only fee allowed by law to be taken by the officer from the party arrested. A verdict having been found for the plaintiff,

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Bompas, Serjt., moved for a rule *nisi* to enter a nonsuit, or for a new trial, on the ground that the verdict was against evidence. He cited *Martin v. Bell* (a), where it was held that the table of fees prescribed by the statute 32 *Geo. 2*, c. 28, does not apply to the sheriff's fee for an arrest; and, if he take a greater fee than by law allowed, debt lies on the statute for the penalty of 50*l*.; and the evidence of what the law allows is what upon taxation by the Master it is the practice to allow—and *Martin v. Slade* (b), where it was held, that, in an action on the 32 *Geo. 2*, c. 28, for penalties against a sheriff's officer for taking a larger fee upon an arrest than is allowed by law, the plaintiff must prove the sum allowed by law, the statute 23 *Hen. 6*, c. 9, not being the rule; and the Court will not set aside a nonsuit grounded on the want of such evidence, in order to enable the plaintiff to recover the excess under the money counts, since he might have obtained redress by a summary application.

It being suggested that the same point had been considered by the Court of *Exchequer*, in a case of *Philpott v. Selby*, in the course of the present term, the Court took time to consult the Barons on the subject.

Cur. adv. vult.

(a) 6 *Mau. & Seiw.* 220.

(b) 2 *New Rep.* 59.

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GASELEE, J., delivered the opinion of the Court:—Upon inquiring about the case of *Philpott v. Selby*, we find that the Court of *Exchequer* have sent the cause down again, not from any doubt they entertained as to the statute 23 *Hen.* 6, c. 9, being unrepealed in this particular, but on the ground that the declaration contained no count precisely adapted to the state of facts proved. In *Drew v. Parsons* (a), where a sheriff claimed, as of right, upon a warrant issued by him in the execution of his office, a larger fee than he was entitled to by law, and the attorney paid it in ignorance of the law; it was held that the latter might maintain money had and received for the excess paid above the legal fee, or might set off the same in an action by the sheriff against him. *Abbott, C. J.*, there says: “It seems to me that the sheriff was only entitled to make the charge of 4*d.* for each of these warrants. If this case be not within the 23 *Hen.* 6, c. 9, the sheriff would not be entitled to anything. The charge in this case may be reasonable, but it is contrary to law, and cannot therefore be allowed.” And *Holroyd, J.*—“The sheriff is not entitled to any fees except those given to him by some act of Parliament: and the only act within which these warrants seem to be included is the 23 *Hen.* 6, c. 9. By that act, the bailiff is empowered to take only 4*d.* for each warrant. If so, unless some other act of Parliament can be found to authorize a larger payment, the sheriff can make no further claim, for no usage can prevail against the positive enactment of the legislature.” In the subsequent case of *Foster v. Blakelock* (b), where it was held that the prohibition in the statute 23 *Hen.* 6, c. 9, against a sheriff’s officer taking more than certain fees upon arrest, is confined to the fees to be taken from the party arrested, and does not extend to restrain the officer from suing for a reasonable com-

(a) 2 B. & A. 562; 1 Chit. Rep. 295.

(b) 5 B. & C. 328; 8 D. & R. 48.

pensation for work and labour at the hands of the party by whom he is employed. *Abbott, C. J.*, there says: "I agree in what has been said, that the sheriff can maintain no action for any fee beyond that which the statute allows him. But in this case I am of opinion that the bailiff could maintain an action against a party arrested to recover his fee of 4*d.*, not more. The prohibition in the statute 23 *Hen. 6*, c. 9, against the sheriff taking more than 1*s.* 8*d.*, and the bailiff 4*d.*, is confined to the taking of fees *from the party arrested*, or those acting for him." On the authority of these cases, we are of opinion that the rule prayed should not be granted, except on the ground of the verdict being against evidence.

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Rule accordingly.

DAVIDSON v. DUNNE.

HUMFREY, on a former day, obtained a rule *nisi* to discharge the defendant out of custody, on the ground (amongst others) of the want of an indorsement on the *ca. sa.*, as required by the rule of *Hilary*, 2 & 3 *Geo. 4*. The defendant had been taken on a *testatum ca. sa.*, properly indorsed.

The Court will not discharge a defendant out of custody on a *testatum ca. sa.*, on the ground of the want of an indorsement on the *ca. sa.* pursuant to the rule of *Hilary*, 2 & 3 *Geo. 4*.

Talfourd, Serjt., was about to shew cause, when the Court called upon—

Humfrey to support his rule.—The indorsement on the *testatum* does not cure the defect in the original *ca. sa.* In *Clarke v. Palmer* (a), a *ca. sa.* was set aside for a similar noncompliance with the rule. And in *Constable v.*

(a) 9 B. & C. 153; 4 M. & R. 141.

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Fothergill (a), *Patteson*, J., said he did not adopt the argument that the rule was made for the benefit of the sheriff: but, the application being too late, he discharged the rule. The defendant being in custody, he has a right to urge the rule to the letter.

Per Curiam.—If the omission had been in the *testatum ca. sa.*, I agree it would have been irregular. But, after a *testatum* has issued, the original *ca. sa.* is a mere formal process giving no information to the parties; and, in the case of a *testatum fi. fa.*, the Court will never take notice of a defect in the *fi. fa.* Indeed, so little strict is the practice in this respect, that the production of a regular *fi. fa.* will suffice, even after a rule obtained for setting aside a *testatum fi. fa.* for a defect in the original writ (b).

Rule discharged.

- (a) Ante, vol. 2, p. 591. 388; *Cowperthwaite v. Owen*, 3 T.
(b) See *Brand v. Mears*, 3 T. R. R. 657.

ARDEN and Another v. JONES.

"No. 1, *Clifford's Inn Passage, Fleet Street, London*," held a good description of the residence of the party by whom a writ is issued, within the 2 *Will.* 4, c. 39, s. 12, without naming any parish.

THE defendant was served with a writ indorsed as follows:—"This writ was issued in person by R. & C. *Arden*, who reside at No. 1, *Clifford's Inn Passage, Fleet Street*, in the city of *London*."

Humfrey obtained a rule *nisi* to set aside the writ, on the ground that the above indorsement was not a strict compliance with the directions contained in the 12th section of the 2 *Will.* 4, c. 39, which requires the indorsement on every writ issued by the authority of that act, to state "the city, town, or parish, and also the name of the

hamlet, street, and number of the house of the plaintiff's residence, if any such there be."

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Talfourd, Serjt., *contra*, cited *Engleheart v. Eyre* (a), where "*Gray's Inn, London*," and *King v. Monkhouse* (b), where "*Gray's Inn Square, London*," were respectively held to be sufficiently descriptive of the plaintiff's residence, where the writ is sued out by the plaintiff in person, or of the attorney, where not.

Humfrey, in support of his rule.—*Engleheart v. Eyre* and *King v. Monkhouse* are not at all applicable: they proceed upon the ground of the place being extra-parochial. Here, however, the statute has not been complied with: *Clifford's Inn Passage* is in the parish of Saint *Dunstan*, and therefore should have been so described.

TINDAL, C. J.—I think the indorsement here is sufficient. The act intended to provide for cities, towns, or parishes by themselves. The argument on the part of the defendant, if well-founded, would compel us to read *and for or*.

VAUGHAN, J.—The name of the street, the number of the house, and the city, are all given. What more can be required? Every city includes many parishes, and yet the word "city" is used in the act.

The rest of the Court concurring—

Rule discharged.

(a) Ante, vol. 2, p. 145.

(b) Ante, vol. 2, p. 221.

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BEAMES v. CROSS.

A motion by the sheriff under the Interpleader Act must be made in Court; but cause may be shewn at chambers.

ON an application on the part of a sheriff, for a rule under the Interpleader Act, made on the last day of term, it was prayed that the rule might be drawn up to shew cause at chambers. The Secondary, referring to the 6th section of the Interpleader Act, 1 & 2 Will. 4, c. 58, suggested, that, in the case of the sheriff, the rule must be disposed of by the Court, no power being given to a single Judge.

Sed, per Curiam.—Although a motion on the part of the sheriff for relief under the Interpleader Act cannot originate at chambers, we see no reason why it should not be ultimately disposed of there.

COLLINS and Another v. GWYNNE.

Where a special case, on which judgment had been given for the plaintiff in this Court, was at the instance of the defendant turned into a special verdict, that he might have an opportunity of obtaining the judgment of a court of error thereon, this Court, after the lapse of two years, refused to allow the plaintiffs the costs occasioned thereby.

JUDGMENT having in *Hilary* Term, 1833, been given for the plaintiffs on a special case, and the costs taxed and paid, the defendant obtained leave to turn the special case into a special verdict. The record was then removed by writ of error to the *Exchequer* Chamber, where the judgment of this Court was affirmed, with costs.

Taddy, Serjt., on the part of the plaintiff, obtained a rule calling on the defendant to shew cause why the Prothonotary should not be directed to tax the plaintiffs the costs occasioned by turning the special case into a special verdict, and entering on the roll the special verdict and carrying the transcript to the *Exchequer* Chamber.

Bompas, Serjt., *contra*, submitted, that, as to the costs occasioned by turning the special case into a special

verdict, the application being made so late (two years having elapsed since these costs were incurred), the Court ought not to entertain it; and that, with respect to the costs arising after the *allocatur* and before the record reached the court of error, they were never allowed in this Court.

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Taddy, Serjt., in support of his rule.—The defendant having brought a writ of error returnable in Parliament, the plaintiffs are compelled to complete the roll in this Court: consequently, these are costs clearly occasioned by the writ of error, but such as could not be noticed or allowed in the *Exchequer* Chamber. Then, the costs of turning the special case into a special verdict were also costs occasioned by the defendant after the taxation of costs here. Both, therefore, ought to be allowed.

TINDAL, C. J.—The costs which the plaintiffs say they ought to have allowed them may be divided into two classes—*first*, those occasioned by the application of the defendant to turn the special case into a special verdict—*secondly*, the costs of putting upon the roll the special verdict, which could not have been allowed when the costs of the trial and of the special case were taxed. With respect to the first set of costs, it was certainly a matter of favour to the defendant to allow the special case to be turned into a special verdict; and I do not say that we should not have compelled him to pay the costs occasioned thereby, had the plaintiffs asked for them at the time. But, after the lapse of two years, I think it would be a little hard to inflict those costs upon the defendant. As, therefore, this application is to our discretion, I am not disposed to accede to it.—With regard to the costs of entering the special verdict on the roll, and carrying the transcript to the *Exchequer* Chamber, they properly belong to the plaintiff below on the affirmance of the

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judgment, unless (and I am not quite clear that it is not so) they are included in the costs usually awarded on affirmance in Parliament. Let the costs go to the Prothonotary, excluding the first set.

The rest of the Court concurring—

Rule accordingly.

DOE dem. WILSON v. ROE.

If one term is allowed to elapse in a town cause between the service of the declaration in ejectment and the motion for judgment against the casual ejector, the notice to appear being in the former term, a rule *nisi* only for judgment will be allowed in the C. P.

WORDSWORTH moved for judgment against the casual ejector in a town cause. The service of the declaration had been effected before last *Easter Term*, the notice being to appear in that term. He cited the cases of *Doe v. Roe (a)*, and *Doe v. Roe (b)*, from which it appeared, that, in the *King's Bench*, under such circumstances, judgment would be allowed to be signed, only one term having elapsed between the service and the motion.

TINDAL, C. J.—(after consulting the Prothonotary). You may take a rule to shew cause, which must be served on the tenant (c).

Rule *nisi* granted (d).

(a) Ante, vol. 1, p. 495.

(b) Ante, vol. 2, p. 196.

(c) In an a country cause, the Court, under similar circumstances, granted a similar motion, in the course of the term.

(d) In the *King's Bench* this is a rule absolute in the first instance, but must be served on the

tenant in possession in the same manner as the rule *nisi* in the Common Pleas. In the case of *Doe d. Greaves v. Roe*, ante, p. 88, Mr. Justice Coleridge held, that judgment is allowed to be signed against the casual ejector under such circumstances only in country causes.

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FOWNES v. STOKES.

ADDISON, on a former day, obtained a rule *nisi* that the defendant might be discharged out of the custody of the sheriff of *Stafford*, on two grounds—*first*, that he had been arrested by an officer, who, at the time of the arrest, had not the warrant in his possession, and was not acting in the presence of the party who held it, and by him detained for twenty-four hours; and that, when so arrested, he was taken into the adjoining county, and there kept two days—*secondly*, that the affidavit upon which the writ was founded was defective, the action being on a bill of exchange, and the affidavit not stating the amount, but merely alleging so much to be due “for principal and interest.”

The Court refused to discharge the defendant out of custody, where he had been arrested by a party not having the warrant in his possession, and had been taken out of the county and detained there two days, the application for relief not having been made until twenty-three days after the arrest.

Talfourd, Serjt., shewed cause, upon an affidavit shewing that the arrest took place on the 12th *May*; that the defendant had an opportunity of consulting his attorney on the 13th; that he was lodged in gaol on the 16th; that the declaration was served on the 28th; and that the present application was not made until the 4th *June*. This, he submitted, was such an unreasonable delay as to deprive the defendant of his right to complain of any irregularity. He cited *Firley v. Rallett* (a), where the arrest was on the 22nd *May*, and the Court held that an application on the 4th *June* to discharge the defendant, on the ground of a defect in the affidavit, was too late.

Addison, in support of the rule.—If the defendant complained of a mere irregularity, undoubtedly the application would be too late. But this is something more: it is a continuing wrong; the custody is altogether illegal, and the sheriff would be liable to an action for false imprison-

(a) *Ante*, vol. 2, p. 708.

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ment. The officer had no right to retake the defendant after the voluntary escape. In *Barratt v. Price* (a), the defendant was discharged from a detainer, on the ground of the irregularity of the original caption. [*Tindal*, C. J. —There the whole proceeding on the part of the officer was fraudulent and illegal.] So, here, the arrest was clearly illegal.

Per Curiam.—This is not a case in which we think we ought to interfere, particularly as the defendant comes so very late. If the defendant has been improperly arrested, he is not without remedy.

Rule discharged, without costs.

(b) 2 Moore & Scott, 634; S. C. ante, vol. 1, p. 725.

LAMBIRTH v. BARRINGTON.

The Court has no power to order rules made under the Interpleader Act to be entered up other than as pointed out in the 7th section, viz. according to their true date.

THIS was an issue tried under an order made upon a rule under the Interpleader Act. After trial, and before judgment was entered up, the defendant died.

Spankie, Serjt., obtained a rule *nisi* to enter the verdict as of *Hilary* Term, and to enter the rules on the record *nunc pro tunc*.

Beere shewed cause, on affidavits setting forth the circumstances, and shewing that the parties had the whole of *Michaelmas* Term last to enter the rules.—The Courts never allow parties to enter up judgments *nunc pro tunc*, except where the delay has been the result of the act of the Court itself. The rule is thus laid down in *Tidd's Practice* (a): "If either party die after a special verdict

(a) 9th edit. p. 932.

or special case, and pending the time taken for argument or advising thereon, or on a motion in arrest of judgment or for a new trial, judgment may be entered at common law after his death as of the term in which the *postea* was returnable, or judgment would otherwise have been given, *nunc pro tunc*; that the delay arising from the act of the Court may not turn to the prejudice of the party." In *Bates v. Lockwood* (a), it was held, that, where an action was brought on a judgment recovered in the *King's Bench*, and after the judgment the defendant brings a writ of error, and obtains a rule to stay proceedings in the meantime, and the plaintiff dies before judgment affirmed, the Court will not permit judgment to be entered *nunc pro tunc*. There is nothing in the circumstances of the present case reasonably calculated to induce the Court to interfere. Besides, the 7th section of the statute 1 & 2 Will. 4, c. 58, expressly precludes their interference: it provides "that all rules, orders, matters, and decisions to be made and done in pursuance of the act, except only the affidavits to be filed, may, together with the declaration in the cause (if any), be entered of record, with a note in the margin expressing the true date of such entry, to the end that the same may be evidence in future times, if required, and to secure and enforce the payment of costs directed by any such rules or orders: and every such rule or order so entered shall have the force and effect of a judgment, except only as to becoming a charge on any lands, tenements, or hereditaments; and in case any costs shall not be paid within fifteen days after notice of the taxation and amount thereof given to the party ordered to pay the same, his agent or attorney, execution may issue for the same by *fi. fa.* or *ca. sa.*, adapted to the case, together with the costs of such entry, and of the execution if by *fi. fa.*; and such writ and writs may bear *teste* on

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(a) 1 Term Rep. 637.

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the day of issuing the same, whether in term or vacation," &c.

Spankie, Serjt., *contra*, relied on the statute 17 *Car. 2*, c. 8, by which it is provided, that, where either party dies between verdict and judgment, "his death shall not be alleged for error, so as the judgment be entered within two terms after the verdict."

TINDAL, C. J.—I feel some difficulty in saying that we have authority under the 7th section of the statute 1 & 2 *Will. 4*, c. 58, to do that which is asked; for, we find it expressly declared by the legislature, that all rules, orders, &c., to be made and done in pursuance of the act, may be entered of record, with a note in the margin expressing the *true* date of such entry. The present rule, therefore, calls upon us to enter the rules in question in direct contradiction to the terms of the act: entering those rules as required, would clearly not be entering them with "the *true* date of such entry." I cannot also but observe that the difficulty is one that the party has in some degree by his own voluntary act become involved in. He had the whole of *Michaelmas* Term (whilst the defendant was still living) in which to enter the rules. I think the rule must be discharged.

The rest of the Court concurring—

Rule discharged.

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DAUBUZ v. RICKMAN.

THIS was an action of covenant on an indenture of lease granted to the defendant and one *John Salter*, since deceased, on the 2nd of *March*, 1818, by one *J. T. Daubuz*, the uncle of the plaintiff, whose devisee he was. The plaintiff in his declaration assigned four several breaches of covenant—1. For non-repair of the demised premises—2. For not repairing &c. the hedges and fences—3. For not manuring meadow land within one month after mowing—4. For non-payment of increased rent for breaking up and converting into tillage part of the land comprised in the indenture, according to the covenants therein contained. The defendant pleaded three pleas to the first breach, two to the second, two to the third, and four to the last breach. The plaintiff demurred to the first and ninth pleas, joined issue on the second, third, fourth, fifth, sixth, seventh, eighth, and eleventh pleas, and replied to the tenth. The defendant joined in demurrer to the first and ninth pleas, and joined issue on the replication to the tenth plea. *Before the issue was made up* the cause was referred to an arbitrator, by articles of agreement, whereby the parties agreed to refer “all the matters in the suit specified in the amended particulars” delivered in the cause: the costs of the suit to abide the event of the award, and the costs of the reference and the award to be in the discretion of the arbitrator. The particulars referred to in the agreement were as follow:—

“The following is and are the amended, further, and better account and particulars of the want of repair of the buildings, and of the penalties and additional or increased rent claimed from the defendant by the plaintiff, and of the breaches of covenant for which this action is brought:—

“*Repair of the buildings.*—For not repairing and keeping and leaving on the 11th of *October*, 1832, in good,

Before the issue was made up, the cause was referred; the costs of the cause were to abide the event of the award. The arbitrator found that the plaintiff had sustained damage to a certain amount upon one of the breaches of covenant specified in his particular; and, as to the rest, that he had no cause of action against the defendant:—*Held*, that the defendant was entitled, under rule 74 of *H. T.*, 2 *Will.* 4, to the costs of those issues that were found for him, notwithstanding the cause was not in strictness *at issue*.

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substantial, and tenable repair and condition, the walls of the premises comprised in the indenture of lease in the declaration mentioned, for which the plaintiff claims the sum of 10*l*.

“ *Penalties.*—The sum of 112*l*., being the penalty of 2*l*. per rod for neglecting and not preserving and keeping, nor leaving on the 11th of *October*, 1832, in good order and condition, the hedge or living fence of the length of fifty-six rods between the fields called the fifteen acres and eighteen acres, being part of the premises comprised in the indenture of lease in the declaration mentioned.

“ The sum of 146*l*., being the penalty of 2*l*. per rod for neglecting and not preserving and keeping, nor leaving on the 11th of *October*, 1832, in good order and condition, the hedge or living fence of the length of seventy-three rods between the fields called the eighteen acres and the horse pasture, being other part of the said premises.

“ The sum of 96*l*., being the penalty of 2*l*. per rod for neglecting and not preserving and keeping, nor leaving on the 11th of *October*, 1832, in good order and condition, the hedge or living fence of the length of forty-eight rods between the fields called the horse pasture and the little barn field, being other part of the said premises.

“ The sum of 86*l*., being the penalty of 2*l*. per rod for neglecting and not preserving and keeping, nor leaving on the 11th of *October*, 1832, in good order and condition, the hedge or living fence of the length of forty-three rods between the fields called the little barn field and the lane between the hedges, being other part of the said premises.

“ The sum of 90*l*., being the penalty of 2*l*. per rod for neglecting and not preserving and keeping, nor leaving on the 11th of *October*, 1832, in good order and condition, the hedge or living fence of the length of forty-five rods between the fields called the fourteen acres and the stump gate field, being other part of the said premises.

“ The sum of 40*l*., being the penalty of 2*l*. per rod for

neglecting and not preserving and keeping, nor leaving on the 11th of *October*, 1832, in good order and condition, the hedge or living fence of the length of twenty rods on the east side of the field called the mill piece, being other part of the said premises.

"The sum of 60*l.*, being the penalty of 2*l.* per rod for neglecting and not preserving and keeping, nor leaving on the 11th of *October*, 1832, in good order and condition, the hedge or living fence of the length of thirty rods between the fields called the three acres and the upper seven acres, being other part of the said premises.

"The sum of 575*l.*, being the penalty of 20*l.* per acre for not manuring within one month after mowing, in the year 1832, 28*a. 3r. Op.*, being one-third part of the meadow lands comprised in the said indenture of lease.

"*Additional or increased rent.*—The sum of 525*l.*, due 11th of *October*, 1832, being one year and a half's additional or increased rent of 350*l.* per annum, for breaking up and converting into tillage, between the 6th of *January*, 1818, and the first of *January*, 1825, seven acres of land, part of the premises comprised in the said indenture of lease, not being land excepted as in the said indenture of lease and declaration mentioned."

The arbitrator, on the 5th of *July* last, made and published his award—finding, "that the plaintiff had sustained damage and been injured to the amount of 10*l.*, by reason of the breach of covenant by the defendant in not manuring within one month after mowing, in the year 1832, part of the meadow lands comprised in the indenture of lease mentioned or referred to in the said amended account and particulars of the plaintiff's demand against the defendant, to wit, an indenture of lease of the 2nd of *March*, 1818." And the arbitrator further awarded, "that, in respect or on account of the several other causes, matters, and things specified in the said amended, further, and better account and particulars of the demand of the

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plaintiff against the defendant, and referred to him as aforesaid, the plaintiff had sustained no injury, and had not at the time of commencing his said action, or at any time afterwards, any cause of action against the defendant." And he further awarded that the defendant should pay the said 10*l.* to the plaintiff within one month; "and that, upon payment thereof, the plaintiff should, if required by, and at the cost of, the defendant, execute and deliver to the defendant a general release in writing of all and all manner of action and actions, &c., touching or concerning the said several particulars, matters, and things so referred to him as aforesaid;" that the costs of the award (assessed at 26*l.* 8*s.* 8*d.*) should be forthwith paid by the defendant; and that each party should bear and pay his own costs of the reference.

The costs of the cause being by the agreement of reference to abide the event, and the award being in favour of the plaintiff as to the issues taken on one of the breaches of covenant charged in the declaration, the prothonotary taxed such costs at the sum of 71*l.* 10*s.*, and refused to tax the defendant's costs of the other issues.

W. H. Watson, on the part of the defendant, in the course of the last term, obtained a rule calling upon the plaintiff to shew cause why the prothonotary should not be directed to tax the defendant's costs of those issues which the arbitrator had in substance found in his favour.

Thesiger now shewed cause. — The motion is founded upon the 74th rule of *Hilary* term, 2 *Will.* 4, which provides that "no costs shall be allowed on taxation to a plaintiff upon any counts or issues upon which he has not succeeded; and the costs of all issues found for the defendant shall be deducted from the plaintiff's costs." The reference was not a reference of the suit, but of "all the matters in the suit specified in the amended particu-

lars." The cause was not at issue; therefore the arbitrator had no authority to find any issues for the defendant; neither has he done so: and consequently the prothonotary had no power to tax the defendant's costs.

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W. H. Watson, contra, was stopped by the Court.

TINDAL, C. J.—It appears to me, that, regard being had to the terms of the 74th rule of *Hilary*, 2 *Will.* 4, and of the agreement of reference in this case, the issues with respect to which the arbitrator has determined that the plaintiff had sustained no injury, and had not at the time of commencing his said action, or at any time afterwards, any cause of action against the defendant, have been virtually and substantially found for the defendant. The parties have agreed that the costs of the suit should abide the event of the award; and, though the cause was not strictly at issue, they have agreed that it shall be treated as a cause in which the issues are properly joined. If the cause were not at issue, the prothonotary could have had no power to tax the plaintiff's costs of the issue that has been found for him. The plaintiff cannot contend that the cause was ripe for judgment so as to entitle him to costs, and not so for all purposes. I therefore think the rule must be made absolute.

The rest of the Court concurring—

Rule absolute.

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On a plea of *plene administravit præter*, where the plaintiff elects to take judgments of assets *quando acciderint*, he is entitled to judgment both for debt and costs.

COX v. PEACOCK, Executor, &c.

THIS was an action of *assumpsit* against the defendant, as executor, to which there was a plea of *plene administravit præter*.

Wilson, for the plaintiff, prayed judgment of assets *quando acciderint* for debt and costs. He cited *Batt v. Deschamps* (a), where, after two arguments, and consulting with the Judges of the *King's Bench*, whose practice had been to allow costs out of the future assets, and on looking into the precedents, this Court held that, when an executor or administrator pleads *plene administravit*, or judgments outstanding and *plene administravit præter*, and the plaintiff, admitting the truth of the plea, takes judgment of assets *in futuro*, the defendant is not liable to costs; and *De Tastet v. Andrade* (b), where the Court of *King's Bench* held, that, though an administrator in such case was not personally liable to pay costs, yet that judgment might well be entered for them, to be recovered *de bonis testatoris quando acciderint*. He also referred to the precedents in *Tidd's Appendix* (c), which contain an award of costs.

The Court said it would be convenient that an uniform rule upon the subject should obtain in all the courts, and therefore they would consult the other Judges upon it.

TINDAL, C. J., on a subsequent day, said that the Judges were agreed that the plaintiff in this case was entitled to the judgment prayed.

Judgment accordingly.

(a) *Tidd*, 9 ed. 980.

(b) 1 Chitt. Rep. 629, n.

(c) Pages 188 to 190.

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FLIGHT v. GLOSSOP.

AFTER the setting down the demurrer in this case for argument, and the delivery of the demurrer books, the defendant became bankrupt. His assignees declining to defend or to give security for costs—

The Court refused to allow a plaintiff to strike a demurrer out of the paper, on the ground of the bankruptcy of the defendant.

Hoggins, for the plaintiff, moved for leave to strike the cause out of the demurrer paper.

W. H. Watson, contra, submitted, that, as all the expenses attendant upon the argument had already been incurred, and the possible interest of a third party (the defendant's attorney) intervened, the cause ought to be suffered to retain its place in the paper.

Per Curiam.—It would certainly be a great hardship on the defendant, who wishes the demurrer to be argued, if we permitted the plaintiff, the moving party, to withdraw at this late hour, *quia timet*. In the absence of a precedent to warrant it, the rule must be discharged, but without costs.

Rule discharged accordingly.

GRANT v. FRY.

IN an action brought to recover the amount of a reward advertized for the apprehension of a felon, a second claimant appearing, the defendant moved for a rule under the Interpleader Act. But,

A contested claim to a reward advertized for the apprehension of a felon cannot be made the subject of a motion under the Interpleader Act.

The Court held that the provision in question did not embrace such a case.

Rule refused.

1835.

SHIRLEY v. JACOBS.

In *assumpsit* against the acceptor of a bill of exchange, part payment may be given in evidence under a plea denying the acceptance, in reduction of the damages.

THIS was an action of *assumpsit* against the acceptor of a bill of exchange for 30*l.* Plea, that the defendant did not accept. At the trial before the Lord Chief Justice, at the sittings at *Guildhall* after last *Hilary* term, the defendant proved part payment to the amount of 11*l.* 15*s.* A verdict was found for the plaintiff for the balance, with 15*s.* for interest, making together 19*l.* 10*s.*

Miller, in *Easter* term, obtained a rule *nisi* to increase the damages to the whole amount of the bill and interest, on the ground that *payment* was not admissible in evidence unless specially pleaded.—*Reg. Gen. H. T. 4 Will. 4, I, 3.*

Bompas, Serjt., and *Mansel*, shewed cause.—Undoubtedly, according to the rule referred to, payment could not be given in evidence in bar or discharge of the action: but there is no reason why it should not be admissible (as offered in the present case) in reduction of damages. Suppose the whole amount of the bill were shewn to have been paid after the commencement of the action, could it be contended that the plaintiff would be entitled to judgment and execution for the entire amount. In *assumpsit*, the plaintiff does not necessarily recover the precise amount of the debt: it is for the jury to say what damages he has sustained by the non-payment. It is upon this principle that bills and notes have always been and still are (on judgments by default) referred to the Master or Prothonotary, to ascertain what is due for principal and interest. The point has already been decided at *Nisi Prius* by the Lord Chief Justice of this Court, whose ruling was adopted by *Denman*, C. J., in the *King's Bench*, and by the Court of *Exchequer* yesterday. And in

—— v. *Padden* (a), *Patteson*, J., in an action for use and occupation, held, that though a plea of payment, which operates as a bar to the action, is not supported by proof of payment of a smaller sum; yet that such evidence may be used in mitigation of damages.

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Miller, in support of his rule.—Before the rules of *Hilary* term, 4 *Will.* 4, part payment might in such a case as the present be given in evidence under the general issue, in reduction of the damages. But now, by the rule referred to, such a defence is required to be pleaded specially. It is even doubtful whether part payment is admissible in evidence under a plea in bar of payment generally. The rule puts payment and set-off upon the same footing in this respect, and it is perfectly clear that no set-off could be proved in order to reduce the damages under the plea here pleaded.

TINDAL, C. J.—I take the meaning of the rule to be this, that payment cannot be given in evidence as an answer to the action unless specially pleaded. In the present case, it was not so offered; but merely in reduction of damages. Whether the plea be the general issue or a special plea, the jury would have two points to inquire into—*first*, for whom the issue was to be found—*secondly*, what damage the plaintiff had sustained. The damages the plaintiff in this case would be entitled to, would be that portion of the bill which remained unpaid. As before the new rules, the defendant was always entitled to prove under the general issue payment (even after issue joined) in reduction of damages, so now I cannot see why any thing should be withheld from the jury that goes to reduce the amount of the verdict. It would be a very singular thing

(a) Sewell's Pr. Dig. 1835, p. 275, n.

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if, when a bill is put in, and the jury see indorsements of part payments on the back of it, they must still upon their oath say that the full amount of the bill remains due to the plaintiff. In the case of a judgment by default, and an assessment of damages before the sheriff, nobody doubts but that payment might be proved in order to reduce the verdict. I think therefore this rule must be discharged.

PARK, J.—Although I on one occasion decided otherwise at the last Assizes, for the reasons given by his Lordship, I concur in the judgment he has pronounced.

GASELEE, J.—It would be absurd to put a construction on this rule different from the old practice. Suppose the whole debt to have been paid after issue joined, might not the defendant have shewn that under the present plea?

VAUGHAN, J.—I am also of opinion that the rule should be discharged. According to the letter and spirit of the rule, it would seem clearly to apply only to matters that go to the root of the action. It provides, that, “in every species of *assumpsit*, all matters in *confession and avoidance*, including not only those by way of *discharge*, but those which shew the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded; *ex. gr.* infancy, coverture, release, *payment*, set-off, &c. &c.” enumerating various examples, the whole of which go to the foundation of the action.

Rule discharged.

1836.

MUNKENBECK v. BUSHNELL.

IN debt on a recognizance of bail, the declaration stated the recognizance to have been entered into in an action of debt by the plaintiff against one *J. Lambert*. The defendant pleaded *nul tiel record*. On the production of the record in *Munkenbeck v. Lambert*, the action appeared to be an action *on promises*.

In debt on a recognizance of bail, the declaration stated the recognizance to have been entered into in an action of debt against *J. S.* On the production of the record (on a plea of *nul tiel record*), it appeared that the original action was *on promises*. The Court allowed the declaration to be amended, on payment of costs, but required a special application for that purpose, and would not permit it to be made to prevent the defendant from obtaining judgment.

Talfourd, Serjt., for the defendant, submitted that this was a fatal variance, and consequently that the defendant was entitled to judgment as upon a failure of the record. *Inces v. Hay* (a), *Rowell v. Dyon* (b).

Mansel, *contrà*, prayed leave to amend the declaration. He cited *Engleheart v. Eyre* (c), where, on *nul tiel record* pleaded to debt on recognizance of bail, the *postea* shewn to the Court proving erroneous in this respect, the Court of *King's Bench* gave leave to amend it.

Per Curiam.—The defendant is entitled to judgment for a failure of the record. The plaintiff, if he wishes to amend, must make a distinct application for that purpose. The fault here is higher up than in the case last cited.

Judgment for the defendant.

ON a subsequent day, *Mansel* obtained a rule *nisi* to set aside the above judgment, and to amend, on payment of costs, upon an affidavit stating that the variance was occasioned by a mistake of the pleader. When the rule

(a) Fort. 353. (b) Lutw. 945. (c) 2 Nev. & Man. 851; 5 B. & Ad. 68.

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came on for argument, *Talfourd*, Serjt., said that, if the Court were disposed to think it reasonable that the plaintiff should amend, he would not oppose it.

Amendment allowed.

BOWDITCH v. SLANEY.

Where the defendant fails to pay the debt and costs within the time mentioned in the indorsement of the writ, he is not entitled to a stay of proceedings on payment of the sum so indorsed.

THE plaintiff having been arrested at the suit of a third party, the defendant became bail for him, and afterwards, upon a threat of rendering him to prison, obtained from the plaintiff the amount of the debt and costs, which he undertook to remit in discharge of the former action. The defendant neglected to remit the money according to his undertaking, and the plaintiff was compelled to pay it, with further costs. The defendant afterwards, and before the commencement of this action, repaid to the plaintiff the sum deposited with him, but refused to pay the subsequent costs; whereupon the plaintiff brought his action. The writ was indorsed for 8*l.* 10*s.* After the expiration of the four days mentioned in the indorsement made pursuant to rule II. of *Hilary* Term, 2 *Will.* 4, and after the plaintiff had declared, the defendant obtained an order of *Park, J.*, to stay the proceedings upon payment of the sum indorsed on the writ, with costs.

Turner, for the plaintiff, obtained a rule *nisi* to rescind this order.

Bayley shewed cause.—He submitted that the defendant, having offered to pay all that was demanded by the indorsement on the writ, was entitled to be relieved from further proceedings; and that the present application was in effect no more than a motion to amend the indorsement,

which this Court, in *Trotter v. Bass* (a), held could not be done.

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Channell, in support of the rule.—Before the rule in question, it is perfectly clear that the plaintiff might add to the demand for which he had held the defendant to bail. Does the rule now confine him to the sum indorsed on the writ? Suppose the demand were for unliquidated damages, or part of it accrued after the expiration of the four days, would the plaintiff be precluded from recovering damages beyond the indorsement? [*Tindal*, C. J.—If you go for unliquidated damages, why indorse a money demand on the writ, and so mislead the defendant?] The indorsement contains a condition which the defendant has not complied with, and therefore he loses the benefit of it.

Per Curiam.—The only question in this case is, whether or not the defendant has brought himself within the condition of the indorsement. He has not paid the sum indorsed on the writ with costs within the time mentioned in the indorsement and in the rule of Court of *Hilary Term, 2 Will. 4*. We therefore think he is not entitled to a stay of proceedings, and consequently, the rule for setting aside the order of Mr. Justice *Park* must be made absolute.

Rule absolute, the costs to be costs in the cause.

(a) 1 Scott, 403; S. C. *nom. Trotter v. Bass*, ante, vol. 3, p. 407.

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THE KING v. THE SHERIFF OF MIDDLESEX, in a Cause of
BROADWOOD v. OGLE.

The Court ordered an attachment against the sheriff to stand as a security, where, had bail been duly put in and perfected, the plaintiff might have set down the cause for the sittings in the term, notwithstanding the accidental circumstance of there being at the time no place for the trial of causes in C. P. in term.

TALFOURD, Serjt., on a former day obtained a rule on the part of the bail in this cause, calling upon the plaintiff to shew cause why an attachment that had been issued therein against the sheriff of *Middlesex* should not be set aside—the defendant having rendered.

John Jervis, for the plaintiff, submitted that he was at all events entitled to have the attachment to stand as a security, he having lost a trial within the meaning of the rule of *Hilary Term*, 2 *Will.* 4, s. V, by which it is ordered, “that, upon staying proceedings, either upon an attachment against the sheriff for not bringing in the body, or upon the bail-bond, on perfecting bail above, the attachment or bail-bond shall stand as a security, if the plaintiff shall have declared *de bene esse*, and shall have been prevented, for want of special bail being perfected in due time, from entering his cause for trial, in a town cause, in the term next after that in which the writ is returnable, and, in a country cause, at the ensuing Assizes.” It appeared from the affidavits that the defendant was arrested on the 23rd *February*, 1835; that an appearance was entered for him on the 3rd *March*; that a declaration *de bene esse* was filed and notice thereof given to the defendant, together with a rule to plead, on the 23rd *March*; that, on the 4th *April*, a Judge’s order was obtained for the sheriff to bring in the body of the defendant, which order was on the 15th made a rule of Court; and that an attachment was obtained against the sheriff on the 23rd *April*, for not bringing in the body: so that, had bail been duly put in and perfected, the plaintiff might have set down his cause for trial at the Sittings in the present term, viz. the 5th *May*. The plaintiff had notice of the

render of the defendant on the 24th *April*. *Jaques v. Campbell* (a) was cited. There, on a question whether a regular attachment against the sheriff should stand as a security, the plaintiff having lost a trial, and it appearing that the cause, which was defended, might have been set down on the last Sitting in term, when defended causes are not usually tried; the Court refused to take notice of the latter circumstance, and held that the plaintiff had lost a trial, and ordered the attachment to stand as a security.

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Talfourd, Serjt., in support of his rule, submitted that the plaintiff could not be said to have lost a trial, inasmuch as there was only one day in the present term for sitting, and that for undefended causes only, and consequently the cause could not be tried within the term.

TINDAL, C. J.—*Jaques v. Campbell* is a decisive authority to shew how the matter stood before the promulgation of the rule cited; and that rule has not altered the practice in this respect. The defendant clearly had no right to put the plaintiff in such a position as to be disabled from setting the cause down for trial this term, and the accidental circumstance of our having no Court at *Westminster* for the trial of causes during the term makes no difference.

The rest of the Court concurring—

Rule absolute—the attachment to stand as a security.

(a) 1 D. & R. 450.

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MILLER, Demandant; MILLER, Tenant.

The return day of the summons in a writ of right may be amended before it is executed.

BUSBY shewed cause against a rule obtained by *Bompas*, Serjt., for setting aside the summons in a writ of right, and all proceedings thereon, for irregularity. The irregularity complained of was, that an amendment had been made on it by the demandant's attorney as to the day of its return, after it had been delivered into the hands of the sheriff. It appeared from the affidavits, that the summons issued on the 10th of *April*, and had originally been made returnable on *Monday*, the 20th, which, by the provisions of the 11 *Geo. 4* & 1 *Will. 4*, c. 70, s. 6(a), was rendered *dies non*, it being one of the days between the *Thursday* next before and the *Wednesday* next after *Easter* day. Those days had been constituted part of the term by 1 *Will. 4*, c. 3, s. 3; but the same section provided, that they should not be days for sittings *in banc*. Then by *Reg. Gen. E. T. 2 Will. 4*, it was ordered, "that the days between the *Thursday* next before and the *Wednesday* next after *Easter* day, shall not be reckoned or included in any rules or notices of other proceedings, except notices of trial and notices of inquiry, in any of the Courts of law at *Westminster*." They must, therefore, be considered as altogether *dies non* according to the present practice of the Court, and therefore any one of them must be unfit to be made the return day of the summons. There was a second objection to it, which was, that it had not a period of fifteen days between its *teste* and return, which, by the practice of the Court, was indispensable. After it had been delivered to the sheriff (before the 20th *April*), the demandant's attorney went to the sheriff, took the writ back, and after altering the return to the 24th of *April*, so

(a) See 1 Dowl. Stat. p. 371; 2 Dowl. Stat. p. 9; Dowling's Practice, p. 39.

as both to make it returnable on a juridical day, and to give a period of fifteen days between the *teste* and return, got it resealed. The summons was then taken to the sheriff, and delivered to him. This alteration thus made was the ground of the present application. One preliminary objection might be taken to it, which was, that it had been made too late. The tenant must have been aware of it on the 20th of *April*, and the application was not made till the 12th of *May*. But, supposing such *laches* not to have existed on the part of the tenant as deprived him of his right to make this application, there was no solid foundation on which it could rest. Amendments in proceedings in writs of right were allowed in the same manner as in other proceedings. He cited *Durden and Another v. Hammond* (a), where it was held, that before a writ is returnable it may be altered as to the return day, without being restamped, provided the last-appointed return day be not beyond the time at which the writ might at first have been made returnable. Here the summons was altered in good time before it was returnable, and the day of the alteration was not beyond that on which it might originally have been made returnable. Being then clearly amendable on the authority of the case cited, it came within the case of *Popkins v. Smith* (b), in which case it was held, that where an irregularity in process is amendable as of course, the Court will not set aside the process, even though it be by attachment of privilege. First, then, on the ground that the present application had been made too late; and, secondly, that there was no difference between amendments in the summons in a writ of right and any other writ in the Courts of *Westminster*; and, thirdly, on the authority of the case last cited, the present rule ought to be discharged.

Bompas, Serjt., supported the rule.—The Courts were

(a) 1 B. & C. 111; 2 D. & R. 211. (b) 7 Bing. 434; S. C. *nom. Popkins v. Amory*, 5 M. & P. 319.

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always exceedingly strict as to amendments in a writ of right. It was by no means a matter of course, as assumed on the other side. In *Adams*, demandant, *Redway*, tenant (a), it was held, that the Court will not assist the demandant in a writ of right; and, therefore, will not allow him to quash a writ of summons which has been irregularly executed. He then referred to the form of proceedings in a writ of right, to be found in *Tyssen*, demandant, *Clarke*, tenant (b), to shew the importance of the summons in such proceedings. Unless fifteen days were given between the *teste* and return of the writ, the proceeding would have been void. The demandant had therefore taken upon himself to make an amendment of so essential a matter. If even the Court might think proper, on application, to make such an amendment, the party himself had no right to make it without the authority of the Court. If he had power to make it himself before the writ left his hands, the demandant had no right to do so when it had been in some way executed in having been delivered to the sheriff. He was bound to make his return to it. The summons in a writ of right was different from the ordinary case of process for bringing the party into Court, the execution of which might be countermanded by a party before it was executed. Under these circumstances, the amendment was improper, and the present rule ought consequently to be made absolute.

TINDAL, C. J.—The objection to the proceedings on which the present rule was obtained, appears to be, that the writ of summons was returnable originally on the 20th of *April*, which was a *dies non*, and was afterwards made returnable on the 24th. If it had continued returnable on the 20th, there not being fifteen days between the *teste* and return, the summons would have been bad. If the officer had

(a) 1 Marsh. 602.

(b) 3 Wils. 558.

prepared this writ, as was formerly the practice, he would of course have taken care to draw it properly. Now, suppose the attorney, who now generally prepares it, had discovered the error before he got out of the office and had brought it back, the officer would have amended the return. What difference is there between such a state of facts and the present case? The writ was delivered to the sheriff, but that can make no difference, as there has been nothing done on it. It was taken back to the officer, the alteration made, and the summons resealed. If it were made appear that any disadvantage accrued from this alteration, it might be different. Nothing of the kind, however, appears to have occurred. But this is nothing more than a judicial writ sued out of Court to the sheriff like a *venire facias*, which is not to be served on the party, and therefore not within the principle on which the latter species of writs are viewed by the Courts. The present rule must, therefore, be discharged.

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PARK, J., GASELEE, J., and VAUGHAN, J., concurred.

Rule discharged, without costs.

COURT OF EXCHEQUER,

Trinity Term,

IN THE FIFTH YEAR OF THE REIGN OF WILLIAM IV.

BIRD v. COOPER and Others.

An action for trespass for taking goods was referred, principally with the view of determining the right of property in the goods; the defendants contending that the plaintiff had no property in them, but that they belonged to a third person: another complaint in the declaration was, that the defendants had committed an assault upon the plaintiff's wife, *per quod consortium amisit*: and all other matters in difference were also referred. No evidence was given before the arbitrator to prove the *per quod*,

THE declaration in trespass contained three counts: *first*, for breaking and entering the plaintiff's house, where he carried on the business of a linen-draper, and seizing and carrying away a large quantity of his goods; *secondly*, for breaking and entering another dwelling-house, and turning the plaintiff and his family out of possession; *thirdly*, for assaulting *Mary Bird*, the wife of the plaintiff, and imprisoning her, whereby the plaintiff lost her society and assistance. The defendants pleaded as to breaking and entering the plaintiff's house in the first count and making a noise and disturbance, and seizing and taking away the goods there mentioned, being in the possession of the plaintiff, that he paid 5*l.* into Court, and that the plaintiff had not sustained more damages than 5*l.* in respect of those trespasses; and as to the carrying away of the goods, and converting and disposing thereof to their own use, that the defendants committed those trespasses as the servants of one *J. S. Groom*, the assignee of *W. Baker*, and by command of the assignee, and by the leave

but there was only one assault proved to have been committed on the wife; and the plaintiff abandoned his claim to part of the goods. The arbitrator made his award, merely ordering the verdict which had been entered for the plaintiff to stand, and the damages to be reduced to 35*l.*, but made no award respecting the right of property in the goods:—*Held*, that the award was sufficiently final.

and licence of the plaintiff; and as to the residue of the trespasses, not guilty. The plaintiff replied to the first plea, that he had sustained more damages than 5*l.*; and to the second, that the defendants committed the trespasses of their own wrong, and without the leave or licence of the plaintiff.

Upon the cause coming on to be tried at the last *Warwick* assizes, a verdict was by consent entered for the plaintiff with 5000*l.* damages, subject to the award of an arbitrator, who was to settle all matters in difference between the parties, and to order and determine what he should think fit to be done by either party respecting the matters in dispute, and also for whom and for what sum the verdict should be finally entered, and upon the other usual terms. The arbitrator awarded that the verdict entered for the plaintiff should stand, but that the damages should be reduced to 35*l.*

A rule *nisi* for setting aside this award was obtained by *Whitehurst*, on behalf of the defendants, on the ground that the award was not final, and upon affidavits which stated that the principal point which ought to have been determined by the arbitrator, and on which account the Judge at the trial recommended a reference, had not been decided by him, which was, in whom the property of the goods was vested; that at the trial the defendants intended to have disputed the plaintiff's property, but there was no plea upon the record to entitle them to do so, and that they also intended to have shewn that the goods had been seized by *Groom*, the official assignee of *Baker*, a bankrupt, and that he had sold the goods by his direction, and that they were merely acting as his servants; that the goods were of the value of upwards of 1000*l.*, and that the arbitrator was required to decide the question of property. Secondly, that a quantity of china and earthenware was claimed by the plaintiff, about which the arbitrator had not determined; and, thirdly, that an assault was proved

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to have been committed on the wife whilst the husband was absent, and that no loss of her society or assistance was proved, and that therefore the plaintiff was not entitled to recover upon the last count, but that he would be entitled to bring another action in the names of himself and his wife, and that the latter matter in dispute had not been determined by the arbitrator.

Sir *W. Follett, Humfrey, and Hurlstone*, shewed cause. —As to the first point, they contended, that the award was final, because the arbitrator had determined all disputes between the parties in the cause; that the fiat which had been issued against *William Baker*, it appeared, by the affidavits in answer, had been annulled before the commencement of the action, and that therefore the only ground for disputing the plaintiff's right to the property which he had acquired by purchase from the supposed bankrupt, failed; that the arbitrator could not make a valid award respecting the right of property in the goods binding on third persons, and that the arbitrator had, in fact, determined the right between the parties in the cause, by ordering a verdict for 35*l.* instead of 5*l.*, which was paid into Court. Secondly, as to the china and earthenware, the affidavits in answer to the rule expressly denied that they were a matter in difference, because when it was discovered that no china or earthenware was mentioned in the declaration, the plaintiff abandoned his claim. And as to the third objection, the affidavits in answer to the rule shewed that there was but one assault upon the wife which was complained of, that the question was left generally to the arbitrator upon the evidence, whether under the circumstances the plaintiff was entitled to recover any damages, and that the arbitrator, by ordering a verdict to be entered on that count, had in fact found that it was proved; that it was unnecessary for him particularly to specify in his award what conclusion he had come

to respecting that part of the case, and that supposing he was wrong in giving a verdict for the plaintiff on that count, under the circumstances, it was a mistake in point of law for which the award could not be set aside.

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Sir *F. Pollock*, *Goulbourn*, Serjt., and *Whitehurst*, in support of the rule.—They contended that the award ought to have determined the right of property, which was the principal object of the reference, and that by that question being left undetermined, further litigation might be the consequence; that though the bankruptcy was at an end, a further question remained, whether the plaintiff had bought the goods *bond fide* of *Baker*, or whether it was a fraudulent purchase, and that the arbitrator ought to have stated upon the award whether they were *Baker's* goods. Secondly, that as the plaintiff claimed the china and earthenware, it ought to have been adjudicated upon by the arbitrator, though it was not mentioned in the declaration, and *Robson v. Railston* (a) was relied on: there, on a reference of all matters in difference, a demand on one side was laid before the arbitrators, and immediately admitted by the other party; no evidence therefore was given concerning it, nor any adjudication upon it requested; the arbitrators published their award of and concerning the matters referred to them, directing payment of a sum of money (without saying on what account) to the party (against whom the above claim had been made) with costs, and it was proved that they left that claim out of their consideration in making their award, as a matter not in dispute; and it was held that the award was bad, as the arbitrators ought to have taken notice of the admitted demand. Thirdly, as to the assault upon the wife, they contended that the arbitrator ought to have mentioned it in his award, as he was expressly required to do; that at present it did not appear what he had determined as to

(a) 1 B. & Adol. 723.

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that matter in dispute, and that if an action were to be brought by the plaintiff and his wife, or by himself alone, it would be impossible to plead the award as an answer, because there was nothing to shew what was determined by it.

BOLLAND, B.—With respect to the first point, it does not appear that any request was made to the arbitrator to find to whom the property belonged. Under this submission he could not possibly find whether the goods were the goods of *Baker* or not. If the official assignee had been made a party, the question might have been raised. As to the objection respecting the china and earthenware, it is sufficient, to say that it is positively sworn, in answer to this rule, that that claim was abandoned; and with respect to the assault on the wife, it is admitted on all hands that there was but one assault proved, and I think the finding of the arbitrator is sufficiently conclusive upon that point.

ALDERSON, B.—I am of the same opinion. As to the first point, I think that the right of property was not a question in difference between these parties, and that it could not be settled by the arbitrator. The answer to the second objection is, that the claim was given up; and I think that *Robson v. Railston* is no authority for the purpose for which it was cited, but rather the other way. Thirdly, the dispute respecting the assault was settled by the arbitrator; and I think that the defendants would have no difficulty, in case a future action should be brought against them, in pleading the award as an answer to such action, if the assault was a matter in dispute at the time of the award.

GURNEY, B.—I am of the same opinion.

Rule discharged with costs.

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ALLIES and Others v. PROBYN.

ASSUMPSIT.—The first count of the declaration stated that the plaintiffs made their bill of exchange for 50*l.* at three months' date, which the defendant accepted and promised to pay; second count, for 500*l.* for goods sold; third count, for 500*l.* on an account stated.

Plea.—The defendant, by *T. M.* his attorney, as to the said declaration, so far as relates to the sum of 83*l.*, says, the plaintiffs ought not to have or maintain their aforesaid action thereof against him, because, he says, that before the commencement of this suit, and after the several causes of action in respect of the said sum of money in the introductory part of this plea mentioned had accrued, the plaintiffs, by a certain memorandum of agreement in writing, bearing date the 14th day of *August*, A.D. 1833, and signed by *W. F. Geach*, being the agent of the plaintiffs, thereunto by them lawfully authorized, in consideration that the defendant would secure the said sum of money in the introductory part of this plea referred to by further mortgage upon certain property at *Pontypool*, in mortgage to Messrs. *Henry Fox* and the said *W. F. Geach* respectively, and would execute such further mortgage, which should contain a power of sale of the premises mortgaged, when called upon so to do, 80*l.* parcel of the same money to carry interest at 5*l. per cent.* from the said 14th day of *August*, and to be paid off by annual instalments of 15*l.*, the first payment to be made on the 14th day of *August* then and now next, the plaintiffs undertook and promised the defendant that no proceedings in respect of the said sum of money in the introductory part of this plea mentioned should be instituted against the defendant, unless in case of default of the payment of the amount due by the said instalments; and the defendant in fact says, that although he, the defendant, has been always ready and willing to execute

To a declaration of *assumpsit* on a bill of exchange with the common counts, the defendant pleaded as to 83*l.* parcel thereof, that after the causes of action accrued, an agreement was made between the plaintiffs and the defendant, that the latter should secure that sum by a further mortgage upon property with a power of sale, and part of that money to carry interest at 5*l. per cent.*, and the whole to be paid by instalments; and that the plaintiffs agreed that no proceedings should be taken in respect of that sum, unless upon default of payment of the instalments as they should become due, and that the defendant was always ready to execute such further mortgage, but had not been called upon so to do. Upon special demurrer to this plea, on the ground, amongst others, that it amounted to accord without satisfaction:
—*Held*, bad.

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such further mortgage, as aforesaid, whenever called upon so to do, yet he hath not been called upon so to do; and this the defendant is ready to verify: wherefore he prays judgment if the plaintiffs ought to have or maintain their aforesaid action thereof against him.

Demurrer.—The plaintiffs say, that the plea of the defendant, so far as the same relates to 83*l.*, parcel of the monies in the declaration mentioned, is insufficient in law. And the plaintiffs, according to the form of the statute in such case provided, state to the Court here the following causes of demurrer to the said plea of 83*l.*, parcel, &c. For that the said defendant has, in his said plea to 83*l.*, parcel, &c., pleaded matters in bar to the plaintiffs' action, in respect of 83*l.*, parcel, &c., which, in form, amount merely to matter of accord, and has not pleaded the same by way of satisfaction: and also, for that the said plea is in other respects uncertain, informal, and insufficient.

The following were the objections stated in the margin. The plaintiffs will contend that the plea to 83*l.*, parcel, &c. is bad—*first*, because the matters therein stated do not amount to a release by the plaintiffs of their right of action against the defendant, as the agreement is not stated to be by deed; *secondly*, nor to accord and satisfaction, because there is no allegation of performance by the defendant of the matter of accord; *thirdly*, nor is there any sufficient consideration for the plaintiffs' promise not to proceed against defendant, in respect of the said sum of 83*l.*; *fourthly*, the matters disclosed in the said plea are bad, by way of mutual agreement between the plaintiffs and the defendant, inasmuch as no right of action is given to the plaintiffs at the time of making that agreement; *fifthly*, the defendant has stated no acceptance by the plaintiffs in satisfaction of the cause of action in respect of 83*l.*; *sixthly*, the defendant has not shewn that he offered to execute the mortgage in manner and form as he promised by the agreement stated in the plea, nor that

the plaintiff dispensed with such offer; *seventhly*, the agreement stated in the plea specified no certain method by which the plaintiffs can obtain payment of the sum of 83*l.*, as it does not appear how many mortgages prior to that proposed to be given to the plaintiffs encumber the property at *Pontypool*, or when it may be made available to the discharge of the defendant's debt of 83*l.* to the plaintiffs, or whether, upon default of payment of the instalments, the plaintiffs are remitted to their original right of action; *eighthly*, by the agreement, it appears that the defendant was not to pay interest for 3*l.*, parcel of the said sum of 83*l.*, parcel, &c.; *ninthly*, the plea is bad, for the causes specified.

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W. H. Watson, in support of the demurrer, was stopped by the Court.

Henderson, in support of the plea, contended, that under the circumstances, the right of action was suspended by the agreement set out in the plea; that it was an agreement on a good consideration to give a mortgage, and that in order to prevent circuitry of action, it was properly pleadable, and he relied upon *Stracey v. the Bank of England* (a). In that case, certain stock of the plaintiffs having been transferred under a forged power of attorney, the Bank offered to replace the stock, if the plaintiffs would first prove the amount under a commission of bankruptcy, issued against a firm in which the forger of the power had been a partner; after this offer, the plaintiffs received a dividend, and engaged to tender a proof of their demand under the commission of bankruptcy: and it was held that they could not sue the Bank in respect of the stock, till they had fulfilled their engagement to tender the proof under the commission of bankruptcy. In the judgment

(a) 6 Bing. 754; 4 M. & P. 639.

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of the Court, these observations are made:—"It is urged by the plaintiffs, that if this is an agreement on their part, it may be the ground of an action by the Bank to recover damages, but that it is no bar to the present action: but the agreement is not set up as a perpetual bar; it is merely insisted on as an objection to the action being brought at the present time; it is urged as an agreement by which the plaintiffs have for a good consideration restrained themselves from suing, not perpetually, but only until they have first done a particular act." So, in the present instance, the plea is not pleaded as a perpetual bar, but only as a suspension of the remedy, upon the same principle that giving a bill of exchange suspends the right of action while the bill is running. The new contract here being founded on good consideration, the plaintiff has committed a breach of that contract by suing on the original cause of action, and for which an action would lie against him; and therefore, to prevent circuity of action, the plea ought to be allowed.

Lord ABINGER, C.B.—This is clearly a bad plea. It is an attempt to plead accord without satisfaction. It is a promise only to do a thing. *Stracey v. The Bank of England* is a wholly different case. There, the contract was partly executed on both sides, and therefore the parties could not be restored to their original rights: the Bank had paid the dividends up to the time of the action, and they could not prove under the commission, but the creditor could. Here, there had been nothing done on the contract. If the mortgage had been executed, the simple contract would have been merged.

BOLLAND, ALDERSON, and GURNEY, Bs., concurred.

Judgment for the plaintiff.

1835.

GODSON v. LLOYD.

GODSON shewed cause against a rule which had been obtained by *Humfrey* on behalf of the defendant for entering a suggestion on the roll under the *London* Court of Requests Act, in order to deprive the plaintiff of his costs. The judgment was signed on the last day of last term: the cause had been tried on a previous day before the undersheriff. He contended that the motion was too late after final judgment signed, and cited *Calvert v. Everard* (a), *Watchorn v. Cook* (b), *Hippisley v. Laing* (c), and *Unwin v. King* (d).

The defendant is now at liberty to move to have a suggestion entered under the Court of Requests Act, to deprive the plaintiff of costs, notwithstanding final judgment may have been signed, if the motion is made as early as can be, and particularly if it appears that the costs have not been taxed.

Humfrey, in support of the rule, contended that the rule about applying before final judgment did not now apply, for as the plaintiff is now in some cases entitled to enter up judgment in vacation, the defendant would be precluded from taking the benefit of the Court of Requests Act if that rule should be held to apply; and he relied upon *Baddley v. Oliver* (e). It was there held, that if a Judge at the assizes, in pursuance of the provisions of the 1 *Will.* 4, c. 7, orders that the plaintiff shall have execution within a limited time, and judgment is thereupon entered up and execution issued in the vacation, the defendant is not precluded from applying in the next term to the Court above to enter a suggestion to deprive the plaintiff of costs. Upon the same principle, *Pyke v. Glendinning* (f) proceeded: it was there held, that as the provisions of 1 *Will.* 4, c. 7, ss. 2 and 4, had been extended to proceedings before the sheriff under the 3 & 4 *Will.* 4, c. 42, s. 17, the Court will in the next term entertain a motion to vacate and arrest a judgment signed in vacation. In *Hip-*

(a) 5 M. & Sel. 510.

(d) Ante, vol. 2, p. 593.

(b) 2 M. & Sel. 348.

(e) Ante, vol. 1, p. 598.

(c) 7 D. & R. 265; and 4 B. & C. 863, S. C.

(f) Ante, vol. 2, p. 611.

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pisley v. Laing, an entire term was allowed to pass, and the Court held that a motion in the next term was too late; but here the motion is made at the first opportunity, and there was no time in the last term when the motion could be made. The trial was at *Worcester*; and it is sworn that the defendant did all in his power to prevent the plaintiff from getting costs, for he offered to pay the debt without costs, and even took out a summons for staying proceedings, upon payment of the debt without costs, but the Judge refused to make an order. But there is an express decision on this point, in this Court, last term, in the case of *Bond v. Bailey*(a): it was there held, that though the costs had been taxed, final judgment signed, and execution issued, the motion was not too late. Even if the rule respecting final judgment was still in existence, it would not apply in the present instance, for it is expressly sworn, that the costs have not been taxed, and that the defendant was ignorant of the trial having taken place until the day before the present motion was made; and he contended, that until the costs were taxed, the judgment could not have been properly signed.

LORD ABINGER, C.B.—As the costs have not been taxed, I think this motion is in time. The reason why such a motion cannot in general be made after final judgment is, that the costs form part of the judgment, which must have been taxed before judgment could have been signed; it would therefore be absurd to ask to enter a suggestion to deprive the plaintiff of costs, for which it appears on the record he has already got judgment. In the present case, it does not appear that the motion could have been made earlier, and therefore the rule must be made absolute.

BOLLAND and GURNEY, Bs. concurred.

Rule absolute.

(a) Not then reported. Ante, vol. 3, p. 808.

1835.

GRIFFITH v. JONES and Three Others.

THIS was an action for an irregular distress, with a count in trover. One defendant pleaded not guilty by one attorney, and the other three by another attorney not guilty. There was a verdict against the first defendant, and against one of the three, and for the other defendants; and the Master taxed the latter defendants their full costs.

Where there are several defendants in trespass, and some are acquitted and others convicted, those who are acquitted are entitled to increased costs, and not merely to forty shillings.

Cowling moved to review the Master's taxation, and cited *Hughes v. Chitty and Poutland* (a), where it was held, that on a joint plea of not guilty to trespass and assault, if one of two defendants be found guilty, with one shilling damages and one shilling costs, and the other acquitted, the latter is entitled only to forty shillings costs.

PARKE, B.—This point was considered by the Judges a considerable time since, and they were of opinion that the old rule of allowing only forty shillings was unjust. *Prima facie*, those defendants who are acquitted ought to be allowed an aliquot proportion of the costs; and if two of three defendants are acquitted, they should be allowed two-thirds.

LORD ABINGER, BOLLAND and GURNEY, Bs., concurred.

Rule refused.

(a) 2 M. & S. 172.

1835.

BATE v. BOLTON.

A defendant having entered an irregular appearance, which he was required by the plaintiff to amend, on a subsequent day and without giving notice to the plaintiff, and after the eight days for the appearance had elapsed, entered a new appearance and demanded a declaration, and afterwards signed judgment of *non pros* for want of a declaration in due time:—*Held*, that the *non pros* was irregular, and that the defendant ought to have amended his original appearance instead of entering a new one.

A writ being to answer the plaintiff in an action of trespass on the case followed by a declaration in trover:—*Held*, regular.

JOHN JERVIS shewed cause against a rule which had been obtained by *R. V. Richards* for setting aside a *non pros* with costs for irregularity. The writ of summons was served on the 24th of *November*. An appearance was entered by the defendant, but there was a mistake in the names, and notice was given to the defendant that the appearance was wrong, and he was required to amend it, which it was promised should be done. Instead, however, of altering that appearance, he entered a new appearance on the 30th of *January*, and demanded a declaration; and as the plaintiff did not declare within the next term, he signed judgment of *non pros*. It was now contended on behalf of the defendant, that the *non pros* was regular, that the old appearance could not be altered, and that the defendant therefore was correct in entering a new appearance. On the other hand, it was contended, that the entering a new appearance instead of amending the old one was irregular, and that at all events, notice of the fresh appearance having been entered ought to have been given; but it is positively sworn that no notice was given: the plaintiff, therefore, was deceived, because he would not expect to find an appearance entered on the 30th of *January*, when there was already an appearance entered before, which the defendant had not thought proper to amend according to his promise. [*Parke, B.*—I think notice should have been given that a new appearance was entered; but the defendant instead of entering the new appearance ought to have amended the old one, which the officer says might have been done; besides, it was too late for the defendant to enter an appearance on the 30th, as that should have been done within the eight days.] The plaintiff committed the first fault by issuing an irregular writ which we required him to amend: the

writ was to answer the plaintiff in an action of trespass on the case, and the declaration is in trover.

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PARKE, B.—There is nothing wrong in that.

Lord ABINGER, C. B.—The rule must be absolute for setting aside the *non pros*, but without costs.

Rule absolute, without costs.

— *In Matter: Park & Exch: 490.*

BROWN v. AUSTIN.

C. JONES shewed cause against a rule which had been obtained by *Barstow*, calling upon the defendant to shew cause why the plea to the first count should not be set aside and the plaintiff be at liberty to sign judgment. This was an action on a bill of exchange by the indorsee against the acceptor, with a second count upon an account stated. The plea to the first count was, that the defendant never received any consideration from the plaintiff for accepting the bill, and it concluded to the country; to the other count, *non assumpsit* was pleaded. It was now contended, that the proper course for the plaintiff to have pursued was, to have demurred to the plea if it was bad in point of law, and that the application ought to have been made to a Judge at chambers: there was also an affidavit of merits made by the attorney for the defendant, in which he swore that from the instructions he had received he had good grounds to believe that the defendant had a good defence upon the merits.

A defendant who was under terms to plead issuably in an action against him as acceptor of a bill of exchange by an indorsee, pleaded that he had received no consideration from the plaintiff, and the plea was delivered so late in *Trinity* term that there was not sufficient time to get the demurrer argued that term. The Court ordered the plea to be set aside, and that the plaintiff should be at liberty to sign judgment unless the defendant consented to amend upon payment of all costs, and going to trial at the next sittings.

Barstow, in support of the rule, cited *Underhill v.*

Seemle, that an affidavit of merits made by the defendant's attorney as to his belief, from instructions received, is insufficient, when the defendant himself might make the affidavit.

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Hurley (a), where a defendant having pleaded a frivolous demurrer so late in the term, that there was not sufficient time to have it argued that term, the Court, upon a motion to set it aside, held that it was irregular, and would only let the defendant in to plead on an affidavit of merits, pleading *instantly*, and paying the costs of the demurrer and the application. The same objection, he said, applied to the present case, for the plea was pleaded so late that there would not have been time to get the demurrer set down for argument: the defendant was under terms to plead issuably, and therefore ought not to be allowed to plead a plea so evidently bad as the present; and the affidavit of merits, instead of being made by the defendant himself, who it appears lives in *London*, is made only by the attorney.

LORD ABINGER, C. B.—I am inclined to think that the affidavit is strictly insufficient, as the defendant resides in *London*; but we will allow the defendant to amend on payment of the costs of the amendment and also the costs of this rule, and undertaking to go to trial at the first sittings after term.

PARKE, B.—The rule was not granted on the ground that the plea was not an issuable plea, but because it is clearly frivolous, and pleaded so late that it could not be argued in the term. The rule must be absolute unless the terms proposed can be agreed to.

Rule accordingly.

(a) Ante, vol. 3, p. 495.

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HILL v. HARVEY.

GODSON shewed cause against a rule which had been obtained by *John Jervis*, calling on the plaintiff to shew cause why the bail-bond given by the defendant should not be delivered up to be cancelled, on the ground of an informality in the writ of *capias* in not properly describing the defendant. The description of the defendant in the writ was, "*Thomas Harvey, late of Devonshire Terrace, New Road;*" and it was contended, on moving for the rule, that by the Uniformity of Process Act (a), the present residence of the defendant ought to have been inserted; that the 4th section required the writ of *capias* to be in the form numbered 4 in the schedule to the act, in which form the defendant is described as "*C. D. of —;*" and it was said that by construing the 4th section with reference to the first section of the act, which expressly requires the writ of summons to contain the name and place of residence of the defendant, it must be supposed that the blank left in the form was intended to be filled up with the real place of residence. The following cases were now relied upon in answer to this objection:—*First, Welsh v. Langford* (b), where the description of the defendant was, "*Captain Langford, of the Honorable East India Company's ship Kellycastle, and now most likely to be found at the East India House in London,*" and it was held by *Taunton, J.*, that this was a sufficient description; and his Lordship there observes, that there is a difference in the description of the defendant in the writ of *capias* and the writ of summons; that in the writ of summons, as the act expressly requires a particular description of the defendant's residence, it must be inserted, but in the *capias* it was sufficient if he was so described as to enable the

In a writ of *capias* it is sufficient to describe a defendant as of his late place of residence, though he may be actually residing at the time at some other place.

(a) 2 Will. 4, c. 39.

(b) *Ante*, vol. 2, p. 498.

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officers to find him out; and in a subsequent case of *Buffle v. Jackson* (a), the same learned Judge held that in a *capias* the description of the defendant's residence need not be particularly given, but that it was sufficient if the plaintiff gave the best description of it he could. The affidavits in answer to the rule stated, that applications had been made to the defendant's attorney to know what was the present residence of the defendant, who said that he did not know; and it was further stated that several letters were seen lying on the attorney's table directed to the defendant, and addressed to him at the betting-rooms of *Tattersall's* and other such places. It was therefore contended that the description was sufficient, as it did not appear that the defendant had any present place of residence, and it was not denied, that in fact he was lately residing in *Devonshire Place*, and that the description of the defendant in the writ was intended merely for the guidance of the sheriff, and that it was not an objection of which the defendant could avail himself.

John Jervis, in support of the rule.—It appears from the affidavit in support of this rule, which is made by the defendant himself, that his place of residence is at No. 3, *Nottingham Place, Mary-le-bone*; the description, therefore, is incorrect: neither is it the best that can be given, as no application was made at *Devonshire Terrace* to know where the defendant lived; and the cases cited, supposing them to be rightly decided, support the present objection, because it was there held that the best description that could be obtained should be given. The introduction of the words "late of" make the description of the defendant insufficient, because whatever was intended by the blank left in the form given by the act, the word there is "of," which shews that the present description

(a) Ante, vol. 2, p. 505.

of the defendant was intended. The 4th section ought to be construed with reference to the first section, which particularly requires the place of residence of the defendant to be inserted in a writ of summons; and as there seems to be no good reason why a more particular description should be given in a writ of summons than in a *capias*, and in the absence of any thing to shew what was really meant by the word "of" in the act, the Court ought to require as great particularity in the *capias* as in the summons; and it has been frequently held that the forms given by the act must be strictly complied with, and that a deviation from the forms given, though apparently trifling, is fatal.

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Lord ABINGER, C. B.—There is nothing in the act to shew what is meant by the word "of" in the writ of *capias*: something, no doubt, was meant by it, but whether a description of the defendant's person or of his residence does not appear, and I am glad to find authorities which shew that this objection is not tenable. That the place of residence is essential in a writ of summons is clear from the words of the form given, for the words are there, "of &c. in the county of ;" but there is a marked distinction between the forms of the summons and *capias* in this respect, that the former is directed to the defendant himself, whilst the latter is directed to the sheriff; and therefore it may have been intended that the defendant might see from the description of him given in the writ of summons that he was the person intended to be served with the writ: whereas the description of the defendant in the *capias* is intended evidently for the guidance of the sheriff, and was intended as a *designatio personæ*. That was evidently the opinion of Mr. Justice Taunton in *Welsh v. Langford*; for there, no place of residence was given, but merely a description of the defendant, as being the captain of a ship, and the statement of a place where he was most likely to

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be found. *Buffle v. Jackson* is an authority also to the same effect. If, therefore, those decisions are authorities for saying that "of" was intended as a *descriptio personæ*, then if the defendant cannot be described of any present place of residence, the best description of him that can be given will be his late residence, for it might happen that the defendant had no certain place of residence, nor was of any profession or calling; and I think, upon the authority of the cases cited, there is a sufficient description upon this writ, considering it merely as a *designatio personæ*. There will be extreme difficulty and injustice in keeping to the precise letter of the act, when it would evidently violate the spirit of it, and it would impose insuperable difficulties in the case of a defendant who might be wandering about the country, and of whom no certain description could be given.

ALDERSON, B.—I am of the same opinion. In the *capias*, the description is merely intended as an instruction to the sheriff; in the summons, it is intended to shew on the face of it that the defendant is the person intended by it. All the difficulty here has been occasioned by introducing the word *late*, which is not to be found in the act.

BOLLAND and GURNEY, Bs., concurred.

Rule discharged with costs.

FLETCHER v. GREENWELL.

The clause in the *Mary-le-bone Vestry Act*, directing that no

action shall be brought for any thing done in pursuance of that act until twenty-one days' notice has been given, only applies to actions for torts, and not to actions of contract.

A witness for the defendant, who at the time of the contract entered into was one of the guardians of the poor, but who at the time of the trial had ceased to be so:—*Held*, to be competent.

P*PETERSDORFF* moved for liberty to enter a nonsuit in this case or for a new trial.—This action had been tried

before the sheriff: the declaration was for work and labour; and the defendant was sued as vestry clerk of the parish of *St. Mary-le-bone*, in pursuance of the provisions of a local act of Parliament; the plaintiff obtained a verdict. The motion was made on two grounds:—*first*, that no notice of action had been given according to the direction contained in the local act of 35 Geo. 3, c. 73, which enacted that no action or suit should be commenced against any person or persons for any thing done in pursuance of that act until twenty-one days' notice thereof should be given in writing to the clerk of the said vestrymen. He relied upon *Waterhouse v. Keen* (a), which was *assumpsit* against a toll collector to recover back tolls which had been improperly taken by the defendant: there was a clause in the act similar to that in the present case, and it was held that the defendant was entitled to notice of action. Mr. Justice *Bayley*, in his judgment, says, "the question is, whether the provision is confined to actions of tort, or extends to actions of *assumpsit*. The substantial part of the enactment is, that notice should be given to the trustees in order that they may tender satisfaction." Here the defendant is not privy to the cause of action. The party to be sued is not a party to the contract sued upon: time should therefore be given to him to make enquiries as to the facts before the writ is issued. In a common case, as a defendant knows all the circumstances, he can make a tender; but the defendant here being a mere stranger, it is of great importance that notice of action should be given, and a reasonable period allowed before the process is actually sued out, otherwise the parish officers would be placed in a less advantageous position than ordinary defendants. [*Parke, B.*—The case cited was in substance an action for extorting money by duress, though the plaintiff was

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(a) 4 Barn. & Cres. 200; 6 D. & R. 257.

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entitled to recover it back by an action of *assumpsit* for money had and received. That case is plainly distinguishable from the present. There is no difference between this and a common case: the guardians must know what contracts they enter into; and it was the duty of the defendant, as soon as proceedings were taken, to have informed his employers of the action, so that they might have paid money into Court if they thought proper. There is a late case upon this point, of *Smith v. Shaw* (a), which was an action against the treasurer of the Commercial Dock Company. There is no case in which it has been held that a contract of this kind is within the act.] The ground for a new trial is on account of the rejection of a Mr. *Eastwick*, who was tendered as a witness for the defendant; but was objected to by the under-sheriff, because at the time of making the contract he was one of the guardians and directors of the poor, though at the trial it was admitted that he had ceased to be so at the time the action was brought. He contended, in support of the motion, that any evidence *Eastwick* might have given could only affect him as a parishioner, and as such he was expressly within the act, which directs that any inhabitant of the parish shall, upon any trial touching any matter concerning the parish of *Marylebone*, be deemed a competent witness, notwithstanding his paying parish rates; and the act expressly directs, that the guardians and directors shall not be personally liable for any execution, &c. The objection, therefore, that he was interested in defeating the claim is not well founded. A rule *nisi* having been granted on the latter point—

E. V. Williams shewed cause, and contended, that the witness was interested in the result of the suit; that the

(a) 5 Mann. & Ry. 225; 10 Barn. & Cres. 277.

witness was in reality one of the defendants, though he was not sued as a defendant. He cited *Whitmore v. Wilks (a)*, where it was held that if trustees are empowered by act of Parliament to sue and be sued in the name of their treasurer for the time being, a trustee is not a competent witness for the defendant in an action so brought.

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Bompas, Serjt. and *Petersdorff*, in support of the rule, were stopped by the Court.

PARKE, B.—I think the witness should have been received. He was neither the real nor the nominal defendant. He was not the nominal defendant, because the act expressly directs the clerk to be sued; nor was he a real defendant, because he was not personally liable; and the act directs, that his being a rated inhabitant shall be no objection. I think, therefore, the rule must be made absolute.

Rule absolute.

(a) 1 Moody & Mal. 217.

HUGHES and Wife v. WILLIAMS.

THIS was an action on a promissory note given to the intestate, with a count on an account stated with him, the wife suing as administratrix to the intestate. The declaration concluded with a profert of the letters of administration, in this form:—"And the said plaintiffs bring into Court here the letters of administration, which give sufficient evidence to the Court here of the grant of administration to the said *E. H.*" &c. To this declaration, there was a special demurrer, alleging for cause that it

A declaration by an administratrix, containing a profert of letters of administration, but not alleging positively that they were granted to her, nor by whom they were granted:—*Held* bad upon special demurrer.

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did not appear by what authority the letters of administration were granted.

John Jervis, in support of the demurrer, contended, that as it was necessary that letters of administration should be granted to the plaintiff before the action was brought, it ought to be alleged in the declaration as a fact, that letters of administration had been granted to the plaintiff, and by whom, in order that the Court might see that they were granted by the proper authority.

R. V. Richards, contra.—The profert of the letters of administration is only for the purpose of enabling the defendant to have oyer, if he wishes for further particulars of them. If oyer had been craved, and the letters of administration had then been set out, they would then have formed part of the declaration, and the objection made would have been obviated. The proper course, he contended, would have been, for the defendant to have craved oyer, and demurred, as was the invariable mode when a deed, profert of which is made, is not properly set out; and that it was not to be assumed that the letters of administration were not properly granted, when being brought into Court the Court had an opportunity of looking at them.

John Jervis, in reply.—The invariable course is, to state by whom the letters of administration are granted: it is part of the plaintiff's title, which he ought to shew on the face of the declaration; and therefore the rule respecting deeds does not apply. Here there is no substantive averment of a grant; and therefore, without such an allegation by the plaintiff, the Court, even if they looked at the letters of administration, could not take notice that they were properly granted to the plaintiff.

Lord ABINGER, C.B.—I think the objection must prevail, but the plaintiff may amend upon payment of costs.

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BOLLAND, ALDERSON, and GURNEY, Bs., concurred.

Leave to amend on payment of costs (a).

(a) The same objection was taken in *Higgs v. Warry*, 6 T. R. 654, and appears to have been acquiesced in without argument.

HART v. WEATHERLEY.

HOGGINS shewed cause against a rule which had been obtained by *W. H. Watson*, on behalf of the sheriff of *Shropshire*, why a rule calling upon the sheriff to make a return to a writ of *capias* should not be discharged. The rule was obtained upon an affidavit that the clerk to the plaintiff's attorney brought the *capias* to the office of the sheriff's deputy in *London*, and applied for a warrant, which was given to him, and which he took away, and sent to an officer of his own selection in the country; and that it was found that the letter never reached the hands of the officer, because the postage was not paid; and the officer, in consequence of having to pay the postage of several letters, which had never been repaid to him, had refused to take in all letters of which the postage was not paid: in consequence of which the letter, which came while he was from home, was refused by his wife, and was returned to the dead letter office. The affidavits, in answer, stated, that the clerk applied in the usual way, at the deputy's office in *London*, for a warrant to an officer, and that he was asked at the office whether he had any particular officer to which he wished the warrant to be directed, and he expressly said that he had not. It was now denied on the part of the plaintiff and his

Where the plaintiff's attorney obtained from the sheriff's deputy, in *London*, a warrant which he sent to an officer in the country by the post, but did not pay the postage, and the officer having in consequence refused to take in the letter, it was returned to the dead letter office:—*Held*, that under these circumstances, the sheriff could not be called on to return the writ.

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attorney, that they had any knowledge of the officer to whom the warrant was directed, or any wish to make him a special bailiff on the occasion; and that it was a common practice to apply for warrants, and send them in the way this was done; and that inquiries had been made at the deputy's office in town whether there was any general rule about paying the postage, and the answer is, that there is not. The fault lay with the officer in not taking in the letter, because the postage was not paid. It is clear that the letter reached him, and was returned; and therefore the sheriff ought to be answerable. The Court will not interfere in this summary way, where it appears that there has been neglect on the part of the sheriff's officer, especially as it appears that this was the usual mode of conducting business; if there had been any neglect on the part of the plaintiff or his attorney, the sheriff has his remedy by action. Another answer to this motion is, that time has been given for returning the writ.

Watson, in support of the rule, contended, that the postage of the letter ought to have been paid, either when it was put in the post-office, or else left at the deputy's office.

LORD ABINGER, C. B.—I think the rule should be absolute. The postage of the letter ought to have been paid; if the warrant had been sent from the deputy's office, he might have known from the handwriting of the letter, that it related to his business of an officer.

PARKE, B.—It does not appear what was paid for the warrant, and therefore it cannot be assumed that there was a sum paid for postage. How could the officer know that the letter related to his public office? The time given to the sheriff to return the writ was for the purpose of enabling him to make this motion; because I

declined to decide this question at chambers. The rule must be absolute.

Rule absolute.

1835.
HART
v.
WEATHERLEY.

DOE v. ROE.

R. V. RICHARDS moved for judgment against the casual ejector. The affidavit as to one of the tenants, stated the service to be thus: "And this deponent further saith, that he served *William Davis*, the tenant in possession, by fixing a declaration on the door of the house, no person being therein."

An affidavit of service on *W. D.* tenant in possession, by affixing of the declaration on the door, no person being therein:—*Held*, to be insufficient for judgment against the casual ejector.

ALDERSON, B.—That will not do, you must proceed as on a vacant possession.

Rule refused.

BOUCHER v. SIMMS.

ADDISON moved for leave to charge a defendant, who was a prisoner in custody of the marshal, in execution, and who was now brought up to the Court for the purpose of being charged with an attachment for nonpayment of costs.

The proper mode of charging a defendant, who is a prisoner in custody of the marshal, with an attachment, is by lodging the attachment with the sheriff, who will take the defendant upon the attachment as soon as he is out of the custody of the marshal.

ALDERSON, B.—The Master certifies that this is not the proper course to be pursued: the attachment should be lodged with the sheriff; and as soon as the defendant is out of custody on the present process, the sheriff can take him on the attachment.

Motion refused.

1835.

ARBUCKLE v. PRICE.

Where a defendant submitted all matters in difference to arbitration, and the arbitrators required him, in pursuance of a power given to them for that purpose, to produce certain books and papers, and an attachment was moved for against him for not producing them:—*Held*, that he could not by affidavit bring before the Court the question whether those books related to matters in difference between them, or not; though it was expressly sworn, that the books merely related to old accounts which had been long since settled, and which it had been agreed between them should form no part of the reference, because by the general terms of the submission of all matters in difference it was left in the discretion of the arbitrator to say what were matters in difference and what were not.

THIS was a rule which had been obtained by *W. H. Watson* on behalf of the plaintiff, calling on the defendant to shew cause why an attachment should not issue against him for not producing before the arbitrators certain books and papers pursuant to a notice given to him by the arbitrators. The deed of submission, which had been made a rule of Court, contained a clause that each party should produce all books, papers, &c. on being required so to do by notice in writing signed by the arbitrators. The rule was also moved upon the 3 & 4 *Will. 4*, c. 42, ss. 39 & 40, and that the plaintiff might be at liberty to proceed with the action unless the books were produced; but the rule was refused on the latter ground, *Parke, B.* saying, that “the statute was out of the question.” The reference was of all matters in dispute between the parties.

Hoggins shewed cause. From his affidavits it appeared that the plaintiff and defendant had formerly been in partnership together in trade, and that when they dissolved partnership, the defendant continued the business by himself on his own account, and the plaintiff acted as his traveller. Disputes having arisen between them, the accounts were gone into, and the plaintiff drew upon the defendant three bills of exchange to the amount of 450*l.* which was the sum found to be due from the defendant in respect of all matters then in difference between them. The defendant paid the bills; and it was sworn that that was intended as a final settlement and a closing of all the accounts between them up to that time, and that the matters in difference out of which this action arose had no connexion with the former disputes, which had arisen some years afterwards; that the defendant had delivered

up all books and papers relative to the matters in dispute between the parties, and that the books, &c. which were required by the arbitrators, related entirely to the previous accounts between the parties, which were finally closed by the settlement to which both had come, and therefore the defendant declined to deliver them up. It was now contended, that a reference of all matters in dispute could not comprise transactions which were completely closed and at an end; especially as it was dictinctly sworn, that it had been expressly agreed between both parties, that those accounts should form no part of the investigation before the arbitrators; and it was submitted that it would be very hard upon the defendant, after he had perhaps destroyed his vouchers upon the supposition that those disputed accounts would not be again inquired into, that the question should be re-opened by the arbitrators.

1835.
ARBuckle
v.
PRICE.

PARKE, B.—The defendant has submitted to the arbitrators all matters in difference; and they say, that these matters are in dispute, and they have required the defendant to produce his books, in pursuance of the rule which he has entered into. It is a question entirely for the consideration of the arbitrators. If the defendant had submitted all the matters in difference except the old accounts, he would have been right; but he has not sufficiently confined the terms of the agreement to the new disputes.

ALDERSON, B.—By submitting to the arbitrator all matters in difference, the defendant has submitted to the discretion of the arbitrator the question, what are the matters in difference, and he must be concluded by his opinion.

Rule absolute for an attachment with costs.

1835.

JONES v. HOWELL.

Where an action was brought by a builder for the amount of extra work done, there having been a written contract between the parties:—*Held*, that the plaintiff ought to have produced the written contract at the trial, in order that it might appear what was within the contract, and what not. But as the objection was not taken by the defendant at the trial, the Court set aside the verdict which the jury had found for the defendant; ordered a new trial without costs.

Where a rule for a new trial is moved for on the under-sheriff's notes, on the ground of the absence of evidence to warrant the verdict of the jury, it is not competent for the other party to use affidavits.

E. V. WILLIAMS had obtained a rule *nisi* for a new trial, on the ground that the verdict was perverse, the jury having found a verdict for the defendant though there was no evidence to warrant it. The trial was before the under-sheriff of *Carmarthenshire*.

Chilton shewed cause.—He was proceeding to use affidavits, but

The Court held that he was not at liberty to use affidavits, as the rule was not moved upon affidavits.

Chilton.—It appears, from the under-sheriff's notes, that the action was for work and labour. The plaintiff, a builder, claimed from the defendant a small sum of money, about 3*l.* or 4*l.*, for extra work beyond what was included in a written contract which had been entered into by both parties. It was therefore contended, that, as the written contract was not produced, there was not sufficient evidence on which to found a verdict for the plaintiff, because without that evidence it was impossible to say what were extra and what were included in the contract; and he cited *Vincent v. Cole* (a). In that case it was held, that, in an action for work and labour, when it is shewn that the work was commenced under a written agreement, such agreement ought to be produced; and that the plaintiff cannot recover without it for extras, although a particular item was proceeded on after an admission by the defendant that it was an extra.

Williams, in support of the rule, contended, that it was perfectly competent for the plaintiff to prove by parol

(a) 1 Moody & M. 257; 2 Carr. & P. 482.

evidence what were extras, and that he had at all events made out a *prima facie* case for a verdict for the value of the work and labour which was proved to have been done, unless the defendant brought forward evidence to rebut the plaintiff's case, which he did not do; but the plaintiff is entitled to a new trial on another ground, that the objection was not taken by the defendant at the trial, and therefore the plaintiff is now taken by surprise; because, if that objection had been taken in proper time, it might have been obviated by producing the contract itself, and if the defendant did not take the objection himself, the jury had no right to do so for him.

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LORD ABINGER, C. B.—I think that it was the duty of the plaintiff to have produced the written contract, in order to shew what were extras; but as the objection was not taken at the trial by the defendant, I think there must be a new trial on that ground. The rule will be absolute therefore without costs.

BOLLAND, ALDERSON, and GURNEY, Barons, concurred.

Rule absolute.

BAISLEY v. NEWBOLD.

CHANDLESS shewed cause against a rule which had been obtained by *Wightman* for staying proceedings on a bail-bond on payment of costs; and the only question was, whether the proceedings were to be stayed on the terms of the bail-bond standing as a security. The writ was dated *February* 18th, and the arrest was on the same day. On the 4th of *March* the bail ought to have justified, but did not. The plaintiff in a bailable action is now at liberty to declare *de bene* immediately after the expiration of the eight days, and at any time before bail above are perfected, whether they have been put in or not; and if the plaintiff has not declared *de bene esse*, proceedings on the bail-bond may be stayed on payment of costs and perfecting bail, without the bail-bond standing as a security.

1835.
 BAISLEY
 v.
 NEWFOLD.

not. The time for putting in bail had then expired. A declaration was afterwards delivered the same day at one o'clock, indorsed conditionally. *Chandless* contended, that the time for putting in bail having expired, the plaintiff could not declare conditionally, and that he could only declare conditionally within the time limited for appearance, and that the object of the rule 11 *Reg. Gen. M. T. 3 Will. 4 (a)*, requiring the plaintiff to declare *de bene esse*, if he intended that the bail-bond should stand as security, was to shew the bail that the plaintiff intended to look to them, and that he ought to use due diligence, and cited *Archbold's Practice*.

PARKE, B.—In the case of *Wendover v. Cooper (b)*, it was determined, that in aailable action the plaintiff may deliver a declaration at any time before the bail are perfected. A doubt has been entertained by some of the Judges, whether a plaintiff can now declare *de bene esse*. The rule, therefore, can only be absolute for staying the proceedings on the bail-bond; and the other question, whether the bail-bond is to stand as a security, must stand over, and we will consult the Judges of the other Courts.

Cur. adv. vult.

(a) Ante, vol. 1, p. 473.

(b) 10 B. & C. 614.

GOSLING v. DUKES.

Knowles shewed cause against a rule which had been obtained by *W. H. Watson*, for staying the proceedings on the bail-bond, and for delivering up the bail-bond to be cancelled upon payment of costs. This was a similar case to the last, but the plaintiff had not declared *de bene esse*. The question was, whether a trial had been lost, the plaintiff not having declared *de bene esse*, though in point of time a trial had been lost. The argument

turned on the construction of the rules *T. T. 1 Will. 4, s. 10 (a)*, *H. T. 2 Will. 4, s. 5 (b)*, and *M. T. 3 Will. 4, s. 11 (c)*, and the Uniformity of Process Act, ss. 11 & 14.

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v.
DUNES.

Cur. adv. vult.

This and the preceding case stood over for judgment from last term, upon a doubt which had been entertained by some of the Judges, whether the right to declare *de bene esse* had not virtually been taken away.

The judgment of the Court in this and the preceding case was now delivered by

PARKE, J.—These cases stood over, in order that the Judges of the other Courts might be consulted. The question turns upon the construction of the 11th rule of *Michaelmas Term, 3 Will. 4*. We have consulted the other Judges, and we think that the right to declare *de bene esse* has not been taken away, and that the plaintiff is at liberty to declare *de bene esse* at any time after the eight days, and before bail above are perfected, whether bail have been put in or not. In the case, therefore, that remained for judgment, where there was no declaration *de bene esse*, the bail-bond will not stand as a security: in the other case, where the plaintiff had so declared, the bail-bond will stand as a security.

(a) Ante, vol. 1, p. 104; and see
Jervis's Rules, *in notis*.

(b) Ante, vol. 1, p. 197.

(c) Ib. p. 473.

BROOKBANK v. MIERS.

CROMPTON shewed cause against a rule which had been obtained by *Wightman* why it should not be referred

Semble, that the Court of Exchequer has power to refer it to the Master to

take an account of the rents and profits of land extended to the plaintiff, and to order him to refund the overplus, if it shall appear that he has been overpaid.

1835.
 BROOKBANK
 v.
 MIERS.

to the Master to take an account under a writ of *elegit* issued against the defendant, and why the plaintiff should not refund to the defendant the overplus, if it should be found he had been overpaid: he contended that it was doubtful whether the Court had power to make such an order.

Wightman referred to *Price v. Varney* (a), where the Court referred it to the Master to take an account of the rents and profits of an estate received by the plaintiff, who was in possession by virtue of an *elegit*, and ordered that the plaintiff should give up possession if it appeared that all the monies due to him had been received.

Crompton.—In that case the old authorities upon the subject were not cited. The most satisfactory mode is by a bill in equity; for in this case, which is upon a judgment, a *scire facias ad computandum* would not lie. The distinction is taken in the old authorities between an *elegit* issued upon a statute and an *elegit* upon a judgment, and our affidavits shew what did not appear in the case of *Price v. Varney*, that the defendant has been guilty of vexatious proceedings.

PARKE, B.—It is very desirable that the Court should have a summary remedy, to prevent the parties being driven into a Court of equity. It may be referred to the Master on the equity side, if both parties consent.

Ultimately, by consent, the whole matter was referred to the Master, who was to act upon the same principle as a Court of equity.

Rule absolute.

(a) 5 D. & R. 612; 3 B. & C. 733.

1835.

BELL v. HARRISON.

WIGHTMAN moved on behalf of the plaintiff to change the venue from *Durham* to *Northumberland*. It was an action for a nuisance at *Shields* in the former county, and he moved this under the late act of 3 & 4 Will. 4, c. 42, s. 22, upon affidavits that the plaintiff could not have a fair trial in the former county, and that it would be more convenient if the trial were to take place at *Newcastle*.

An application by the plaintiff to change the venue in a local action, under the 3 & 4 Will. 4, c. 42, s. 22, cannot be made till issue is joined.

W. H. Watson shewed cause, and objected that it did not appear upon the affidavits in support of the rule that issue was joined.

Wightman, in support of the rule, urged that the motion was on special grounds, and that the objection did not apply.

PARKE, B.—How can it be said what the issue will be till the defendants have pleaded?

ALDERSON, B.—The words of the act support the objection. The 22d section gives the Court power to order the *issue* to be tried in any other county or place than that in which the venue is laid.

LORD ABINGER, C. B.—We have no authority under the act.

Rule discharged.

1835.

CAWTHORNE v. CAWTHORNE.

Where the reduction of the plaintiff's claim was occasioned by a dispute as to the right of the defendant to claim a set-off:—*Held*, that, though the arbitrator awarded in favour of the defendant in respect of the set-off, and thereby reduced the plaintiff's claim a third, that the defendant was not entitled to his costs under the 43 Geo. 3, c. 46, s. 3.

ERLE shewed cause against a rule which had been obtained by *Knowles*, calling upon the plaintiff to shew cause why the Master should not tax the defendant the costs of this action, under the 43 Geo. 3, c. 46, s. 3, on the ground that the defendant had been arrested for 40*l.*, and the plaintiff had only recovered 27*l.* 10*s.*; the arbitrator, to whom the cause was referred, having allowed the defendant 12*l.* 10*s.*, which was the whole amount of the defendant's set-off for goods supplied to the plaintiff. From the affidavits in answer to the rule, it appeared, that the plaintiff, who was the mother of the defendant, had been left a widow, with a family of several daughters, besides the defendant, and that their friends had raised a sum of 80*l.* for her, which she had lent to the defendant for the purpose of his carrying on the business of her late husband for the benefit of her family; that she had never undertaken to pay what the defendant had supplied for the family, and did not consider herself liable for the amount; and that the defendant was now in good circumstances, and that she was in distress; and it was contended that the mere circumstance of the verdict being for less than the amount for which the arrest took place was not sufficient, unless it was shewn by the affidavits in support of the motion, that the plaintiff had knowingly arrested the defendant for more than was due.

Knowles contra contended, that it must be taken from the finding of the arbitrator that the plaintiff was liable to pay the claim set off; and as it was sworn that invoices had always been sent with the goods, and as the plaintiff knew that she was always debited in the defendant's books with the amount, she must have known of the set-off, and that the reduction there made by the arbitrator, amounting to

one-third of the sum for which the arrest was made, had been frequently held to be such a considerable reduction as to entitle the defendant to the benefit of the act.

PARKE, B.—I think that the plaintiff had fair grounds for disputing the set-off, and therefore the case is not within the act.

The other Barons concurred.

Rule discharged.

1835.
CAWTHORNE
v.
CAWTHORNE.

FALLOWS v. BIRD.

ASSUMPSIT.—*First* count on a bill of exchange, dated the 15th August, 1834, drawn by the plaintiff in his own favour for 65*l.*, at three months after date and accepted by the defendant; *second* count, for 100*l.* for work and labour by the plaintiff as an agent, 100*l.* for work and labour as a surveyor &c., 100*l.* for interest, and 100*l.* on an account stated; to the damage of the plaintiff of 200*l.*

Plea.—As to the sum of 35*l.* parcel of the said sum of money in the said bill of exchange in the said first count mentioned, the defendant says that he accepted the said bill of exchange, so far as respects the said sum of 35*l.*, for the accommodation of the plaintiff, and upon the terms that if defendant should pay the said sum of 35*l.*, the same should be returned to him, and that he should not be liable or called upon to pay the said sum to the plaintiff; and the defendant further says that the plaintiff always held and still holds the said bill under those terms; and this the defendant is ready to verify, &c. And as to the sum of 40*l.*, other parcel of said sums in

To a declaration on a bill of exchange with a count for work and labour, the defendant pleaded as to 35*l.*, part of the money in the declaration mentioned, that the bill as to that sum was an accommodation bill, concluding with a verification; and as to the sum of 40*l.*, other parcel of the sums mentioned in the declaration, he pleaded payment of that money into Court, concluding with a verification; and, as to the residue of the sums and the promise in the last count of the declaration

mentioned, and not before pleaded to, *non-assumpsit*. Upon the first plea the plaintiff took issue, and, as to the last plea, added a *similiter*, but said nothing as to the plea of payment of money into Court. At the trial the plaintiff obtained a verdict with 30*l.* damages:—*Held*, that there was no ground for arresting the judgment.

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said declaration mentioned, the defendant says that the plaintiff ought not further to maintain his action against the defendant, because he now brings into Court here the said sum of 40*l.*, other parcel &c., ready to be paid to the plaintiff. And the defendant says that the plaintiff has not sustained damages to a greater extent than the said sum of 40*l.* in respect of the causes of action in the said declaration mentioned as to that sum. And this the defendant is ready to verify, &c. And as to the residue of said sums and promise in the last count of said declaration mentioned, and not before pleaded to, the defendant says that he did not promise &c.

Replication.—As to said plea of said defendant by him first above pleaded, the said plaintiff says that he, the said plaintiff, ought not to be barred from having and maintaining his aforesaid action thereof against him the said defendant, because he says that the said defendant did not accept the said bill of exchange, so far as respects the said sum of 35*l.*, for the accommodation of the said plaintiff, and upon the terms that if said defendant should pay the said sum of 35*l.* the same should be returned to him, and that he should not be liable or called upon to pay the said sum to the said plaintiff in manner and form as the said defendant hath above in his said first plea in that behalf alleged, and this he the said plaintiff prays may be inquired of by the country, &c. As to the said plea of the said defendant by him lastly above pleaded, and whereof the said defendant hath put himself upon the country, the said plaintiff doth the like.

The action was tried at the last *Warwick* Assizes, when a verdict was found for the plaintiff—damages 30*l.* The plaintiff had before taken the 40*l.* out of Court.

A rule *nisi* for arresting the judgment having been obtained by *Gale*, on the ground that no issue was joined upon the second plea,

Goulburn, Serjt., shewed cause.—The only question is,

whether the record is not perfect as it is, or whether the plaintiff is not now in time to make it perfect by adding a *nolle prosequi* as to the second plea, and if he is, the motion is premature. The new rules, which give the form of the plea of payment of money into Court, direct that the plaintiff may reply by taking the money paid in out of Court, and it gives no form of a replication, except where the plaintiff has sustained greater damages than the amount of the sum paid in. The plaintiff has not replied that he has sustained more damages, but he has taken the money out of Court, and therefore there is an end of that issue; but, if it is necessary to add anything upon the record to make it appear consistent, he is still in time to make an entry upon the record that he is satisfied as to the 40*l*. In the case of *Fleming v. Langton* (a), *non-assumpsit* was pleaded to three of the counts of the declaration, and a demurrer to the fourth; and the plaintiff having got judgment upon the demurrer, he took out a writ of inquiry and executed it, and the Court refused to set it aside on account of the other issues not having been disposed of, and said that a *nolle prosequi* might be entered on the roll when the final judgment was entered. The same point was determined in *Duperoy v. Johnston* (b). Here all the issues, except as to that upon the 40*l*., have been found in favour of the plaintiff by the jury. The finding of that issue must therefore become immaterial.

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Gale, in support of the rule.—The jury could not properly try the issues on this record, because as to one of them no issue was joined. These must be considered as several pleas to different parts of the plaintiff's claim, though all make but one defence (c). All the issues ought to have been disposed of, and it ought to have been shewn on the record what has been done upon the issue as to the payment of the 40*l*. The jury could not take notice

(a) 1 Strange, 532.

(b) 7 T. R. 472.

(c) Co. Litt. 304.

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of that plea, because no issue was joined upon it; it was impossible for the jury to know whether the plea was admitted to be true or not, and the verdict given may have included part of the 40% as damages. The cases cited have no reference to this question: those cases only shew that where there are several counts the plaintiff may abandon some of the counts, and take a verdict upon the others; but here he has gone to trial generally upon the whole of the record, and the verdict was given generally when there was no issue joined as to part of the plaintiff's demand: it is therefore a discontinuance, and the judgment must be arrested.

LORD ABINGER, C. B.—I think there is no ground for arresting the judgment, and that there was no occasion to have entered a *nolle prosequi* before the trial: it is the mode in which the defendant has pleaded that has introduced all the perplexity; for the defendant does not follow the form given by the rules, but he says that as to 40% the plaintiff has sustained no damages to more than 40%. If the proper form of plea had been adopted, the plaintiff might have replied in the usual way; and, in the way in which the pleas are pleaded, it appears to me that the plaintiff had a right to treat them all as one plea, and that he has taken issue upon every thing that he could, for he could not say that he had sustained more damages than the 40% paid into Court, as it was pleaded only to 40% on the face of the record. The judgment appears to be right, and ought not to be disturbed.

ALDERSON, B.—I am of the same opinion. It appears to me that all the pleas must be taken as one. The plea concludes with a verification, though there is nothing to reply to it; for how could there have been greater damages than 40% found upon this plea, which is expressly confined to 40%. The form given by the new rules concludes

with a verification, because that is pleaded to the whole declaration, and not to a specific sum, as it is here. A miscontinuance is cured by verdict. The rule must be discharged.

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GURNEY, B., concurred.

Rule discharged.

COCK v. COXWELL.

THIS was an action on a bill of exchange, by the plaintiff as indorsee, against the defendant as acceptor. The defendant pleaded that he did not accept the bill, on which issue was joined. At the trial before the under-sheriff of *Middlesex*, the defendant proved that *Hawkes*, the drawer, had altered the date of the bill from the 5th of *December* to the 15th of *December*; it was also proved, that it was an accommodation bill, as between the defendant and the drawer. It was objected on the part of the plaintiff that evidence of alteration of the date was not admissible upon the plea of non-acceptance; that that plea merely put in issue the fact, whether the defendant accepted the bill which was produced, and which it was proved that he did, and that the alteration of the bill since its acceptance by the defendant was a fact, which, since the new rules, could only be made available on the part of the defendant by plea. These objections were overruled, and it was left to the jury to say, whether the bill was altered since the acceptance, and if they thought it had been, they were directed to find a verdict for the defendant. The jury having found for the defendant—

In an action on a bill of exchange against the acceptor, the defendant pleaded that he did not accept the bill:—*Held*, that it was competent for him under this plea to give in evidence, that since he accepted the bill a material alteration was made in the date, which vitiated the bill.

Thomas moved to set aside that verdict, and to have a new trial, on the ground of misdirection, and the admission of improper evidence by the under-sheriff. The new

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—
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v.
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rules, he contended, were sufficient to include a defence like the present. They directed, that all matters in confession and avoidance, as well those by way of discharge as those which shew the transaction to be void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded. This defence, therefore, was a matter in confession and avoidance; for the defendant could not deny that he had accepted a bill for the drawer, but his defence was, that after it was drawn his liability was discharged by the drawer making the bill void by altering it; and in one case, a plea of this sort was put upon the record, and no objection was taken to it. If such a plea can be pleaded, it ought to have been in this case, because otherwise the plaintiff is taken by surprise, which it is the object of the new rules to prevent; upon the present occasion, the plaintiff was quite unconscious of the nature of the defence which the defendant intended to set up, and concluded that the only point in dispute was, whether it was the defendant's handwriting to the bill, which was proved by his own admission. The plaintiff might, if he had been aware of the defence, have been prepared with evidence to rebut it; and in a late case in the *Common Pleas*, of *Barnett v. Glossop* (a), it was held that an objection taken by the defendant, that the contract upon which the plaintiff declared ought to have been in writing, was not available, because the fact ought to have been specially pleaded. There is another point upon which this motion is made—that the bill being an accommodation bill made between the defendant and the drawer, could not be said to have been negotiated till it was given to the plaintiff, who was an indorsee for value, and the alteration was made before the bill was indorsed to the plaintiff.

(a) Ante, vol. 3, p. 625.

BOLLAND, B.—I am of opinion that the new rules of pleading do not apply to this case. The plea is, that the defendant never accepted the bill upon which the plaintiff has declared, and which he produced in evidence, that is, that he never accepted the altered bill; and I think it cannot be said that he ever did accept the altered bill.

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v.
Coxwell.

ALDERSON, B.—The plea puts in issue the fact, whether the defendant accepted the bill; and under that plea I think the evidence was properly admitted.

GURNEY, B., concurred.

Rule refused.

EDGE v. SHAW and Wife.

ARCHBOLD shewed cause against a rule which had been obtained by *Humfrey* for setting aside the verdict for the defendant, and for a new trial. The trial had taken place before the under-sheriff, under the provisions of the Writ of Trial Act; but it appeared that the writ, having been produced in evidence, was indorsed for 58*l*. The action was brought for goods supplied to the defendant's wife before marriage. The bill of particulars claimed only 16*l*. 10*s*. 8*d*. There was no plea of payment, and the objection was, that evidence had been admitted for the defendant, which could only have been let in under that plea. It did not appear by whom the order for the writ of trial had been obtained; but it was now objected by *Humfrey*, on the part of the defendant, that the sheriff had no jurisdiction.

Where an order was obtained, under the Writ of Trial Act, for a trial before the sheriff, and the sum indorsed upon the writ was 58*l*.—*Held*, that the verdict must be set aside, though both parties had gone to trial before the sheriff without making any objection.

Where a cause is proper to be tried by the sheriff under the Writ of Trial Act, but by mistake a larger sum is indorsed on the writ than the plaintiff claims, the writ to be amended.

GURNEY, B.—The order for trial must have been im-

and than is allowed by the act, the Court will allow the writ

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EDGE
&
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properly obtained: the verdict must therefore be set aside.

ALDERSON, B.—There is no doubt but that this was a proper case to be tried before the sheriff; but the writ must be amended by inserting the sum claimed by the particulars. The act (a) only applies to actions where the sum *indorsed upon the writ* does not exceed 20*l*.

Rule absolute (b).

(a) 3 & 4 Will. 4, c. 42, s. 17.

(b) See *Watson v. Abbott*, ante, vol. 2, p. 215.

MUPPIN v. GILLATT.

A motion for a new trial in a cause heard before the sheriff under the Writ of Trial Act must be made within the four days, and if the sheriff's notes cannot be obtained within that time, there must be a special affidavit of facts.

HEATON applied for a new trial. The trial had taken place before the sheriff in the country under the Writ of Trial Act. He said he had been unable to procure the sheriff's notes, nor had he got an affidavit of facts. The question turned upon the evidence.

PARKE, B.—We cannot hear such a motion without having the notes or an affidavit, and that affidavit should have been procured in proper time. The rule must therefore be refused.

ALDERSON, B.—It would have been sufficient to have had either the notes or an affidavit; but, in the absence of either, we must presume the verdict is right.

Rule refused.

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KIRBY v. SNOWDEN.

HOGGINS moved for a rule calling upon the plaintiff to show cause why he should not deliver particulars of his demand within two days, or, in case of his not so doing, why the defendant should not be at liberty to sign judgment of *nonpros*. The defendant was served about three months since with a writ of summons, and immediately took out a summons for particulars of demand, before the declaration had been delivered. The plaintiff had since been frequently required to go on, or to enter a *stet processus*, but he had refused to do either.

A defendant, being served with a writ of summons, obtained an order for particulars before declaration. After waiting three months, the plaintiff refused to go on with the action, or to enter a *stet processus*; the Court refused an application to compel him to do so.

ALDERSON, B.—This is a novel application, and I think I ought not to establish a precedent of this sort. The practice is, that if the plaintiff does not proceed within twelve months, the cause will be out of Court: if that time is too long, there should be a new rule of court to alter it. The rule must be refused.

Rule refused.

PAINE and Another, surviving Executors, v. EMERY.

COVENANT.—The declaration stated, that, on the 3rd day of *December*, A. D. 1825, by a certain indenture then made between *James Paine* deceased of the one part, and the defendant of the other part, (with a *profert in curiam*,) after reciting as therein is recited, the said defendant *for the considerations* therein mentioned, amongst other things, did for himself, his heirs, executors, and administrators covenant, promise, and agree to and with the said *James Paine* deceased, his executors, administrators, and assigns, that he the said defendant, his heirs,

In covenant the declaration stated that the defendant covenanted to pay a certain sum of money at a certain time. Upon oyer, the covenant appeared to be to pay the money at that time, and also at a particular place. The defendant demurred, and assigned the

variance as a cause of demurrer:—*Held*, that there was no material variance.

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executors, administrators, or assigns, or some or one of them, should and would well and truly pay, or cause to be paid, unto the said *J. Paine* deceased, his executors, administrators, or assigns, the sum of 100*l.*, and interest for the same at the rate of 5*l.* for 100*l.* for a year, on the 3rd day of *June* then next ensuing the day of the date of the said indenture, without any deduction or abatement for taxes, or any other matter, cause, or thing whatsoever, by authority of Parliament, or otherwise howsoever, according to the true intent and meaning of the said indenture, as by the said indenture (reference being thereunto had) will, amongst other things, more fully and at large appear. Nevertheless, the said plaintiffs in fact say, that the said defendant did not nor would well and truly pay, or cause to be paid, unto the said *James Paine* in his lifetime, since deceased, the said sum of 100*l.*, and interest for the same as aforesaid, on the said 3rd day of *June* then next ensuing the day of the date of the said indenture as aforesaid, although the said *J. Paine* deceased was then living, but therein failed and made default; and thereupon, and in the lifetime of the said *J. Paine* deceased, to wit, on the day and year last aforesaid, there became and was due and owing from the said defendant to the said *J. Paine* deceased, for and on account of the said sum of 100*l.*, and interest thereon until the said 3rd day of *June* next ensuing the day of the date of the said indenture as aforesaid, a large sum of money, to wit, the sum of 100*l.* above demanded, and 2*l.* 10*s.* for interest as aforesaid, whereby an action accrued to the said *J. Paine* in his lifetime, since deceased, to demand and have of and from the said defendant the sum of 100*l.* above demanded, and the said sum of 2*l.* 10*s.* for interest as aforesaid. Breach, non-payment to *J. Paine*, or to the plaintiff's executors, &c.

Demurrer.—And the defendant *A. B.* comes and prays oyer of the said indenture, and it is read to him in these

words, to wit:—"This indenture, made the 3rd day of *December*, in the sixth year of the reign of our sovereign lord *George* the Fourth, by the grace &c., King, Defender of the Faith, and in the year of our Lord 1825, between *Thomas Emery* of *Porton* in the county of *Bedford*, thatcher, of the one part, and *J. Paine* of *Gamlingay* in the county of *Cambridge*, yeoman, of the other part, witnesseth, that, *for and in consideration of the sum of 100l.* of lawful money of *Great Britain* in hand well and truly paid by the said *J. Paine*, at or immediately before the sealing and delivery of these presents, the receipt whereof he the said *Thomas Emery* doth hereby acknowledge, and of and from the same and every part thereof doth acquit, release, and discharge the said *J. Paine*, his heirs, executors, administrators, and assigns, and every of them for ever by these presents, he, the said *Thomas Emery*, hath granted, bargained, sold, and demised, and by these presents doth grant, bargain, sell, and demise, unto the said *J. Paine*, his executors, administrators, and assigns, all that cottage or tenement, &c. yielding and paying therefore the rent of a pepper-corn only on the feast day of *St. Michael the Archangel*, if the same shall be lawfully demanded: provided always, and upon this express condition, nevertheless, that if the said *Thomas Emery*, his heirs, executors, administrators, or assigns do and shall well and truly pay, or cause to be paid unto the said *James Paine*, his executors, administrators, and assigns, *at or in the porch of the parish church of Gamlingay aforesaid*, the full and just sum of 100l. of lawful money of *Great Britain*, with interest for the same of like lawful money, at the rate of 5l. for every 100l. for a year, on the 3rd day of *June* now next ensuing the day of the date hereof, without any deduction or abatement for taxes, or any other matter, cause, or thing whatsoever, by authority of Parliament, or otherwise howsoever, then from and immediately after such payment

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so to be made as aforesaid, these presents and the said term of 1000 years hereby granted shall cease, determine, and be void, any thing herein contained to the contrary thereof in any wise notwithstanding. And the said *Thomas Emery* doth hereby for himself, his heirs, executors, and administrators, covenant, promise, and agree to and with the said *James Paine*, his executors, administrators, and assigns, in manner following: that is to say, that he the said *Thomas Emery*, his heirs, executors, administrators, or assigns, some or one of them, shall and will well and truly pay or cause to be paid unto the said *J. Payne*, his executors, administrators, or assigns, the said sum of 100*l.*, and the interest for the same as aforesaid, *at the time, place, and in manner* hereinbefore limited or appointed for the payment thereof, according to the true intent and meaning of these presents, without any deduction or abatement out of the same, or any part thereof as aforesaid." Which being read and heard, the defendant by his attorney says, that the declaration of the plaintiff is not sufficient in law; and for cause of demurrer the defendant saith, there is a material *variance* between the covenant set forth in the declaration and the covenant mentioned in the deed read to the defendant as aforesaid on oyer, and above set forth by the defendant in this Court; viz. that the covenant declared on is a covenant for the payment by the defendant of the sum of money therein mentioned generally, whereas the covenant contained in the said deed is a covenant to pay the same at a particular place, to wit, at or in the porch of the parish church of *Gamlingay* aforesaid, and, for any thing that appears upon the face of the declaration, he, the defendant, might have been at the time and place specified in the covenant in the said deed ready with his said money, and willing to pay the same to the plaintiff, if he, the plaintiff, had been then there to receive the same; so that on the face of the record, there does not appear that any breach of

covenant had been committed by the defendant; and also for that the declaration alleges the said covenant to have been made by the defendant for the *considerations* therein mentioned, whereas the said deed contains but *one* consideration only for the said covenant by the defendant; and for that upon the whole of the pleadings no cause of action appears to have arisen; and for that the declaration is in other respects defective and inartificial.

Joinder in demurrer.

Platt, in support of the demurrer.—The question is, whether the variance between the covenant as set out in the declaration and that set out in the deed on oyer, is or is not a material variance. That it is a material variance is clear from several authorities. In *Com. Dig. tit. Condition, G. 9*, it is laid down, that if a place certain be limited for payment, the obligor is not bound to pay at another place; and 1st *Roll. Abr. 445, l. 52*, and 444, *l. 7*, is cited as the authority for that position. *Rowe v. Young* (a) is also an express authority to the same effect. There it was held, that if an acceptor accept a bill of exchange payable at a particular place, he does not thereby undertake to pay generally, but only at the place pointed out by the acceptance. It has been frequently held, that a general covenant to pay binds the covenantor to pay any where; the covenant, therefore, as stated in this declaration, must be construed as an undertaking to pay at any place, whereas, in point of fact, the covenant is only to pay at one particular place. The declaration, therefore, represents the defendant's contract to be much more extensive than it really is, and the variance is therefore material. Another variance, which is also made a ground of special demurrer, is, that the declaration states that there were several considerations for the covenant entered into by the

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(a) 2 Brod. & Bing. 165, in error.

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defendant; whereas, in fact, there is but one consideration mentioned in the deed, viz. the payment of 100*l*. The only remaining question is, whether the defendant is correct in taking advantage of this objection on demurrer. *Sacheverell v. Froggatt* (a) is an express authority that he may; and, though no doubt it might be taken advantage of on the plea of *non est factum* also, yet it is open for the defendant to do either the one or the other.

Wightman, in support of the declaration.—The question of variance cannot be raised upon demurrer; because, when the defendant sets out the deed on oyer, he makes it part of the declaration; and unless, upon looking at the whole of the declaration it appears clear that the action cannot be maintained, the plaintiff is entitled to judgment. *Snell v. Snell* (b) is an authority to that effect. There *Bayley, J.*, says, “If a plaintiff states the legal effect of a deed, the defendant has a right to see it on oyer; and if the meaning varies from that attributed to it in the declaration, in order to take advantage of that variance, he should plead *non est factum*, without setting out the deed. If it does not support the breach, he should set it out and demur. If, however, he sets out the deed on oyer, and pleads *non est factum*, the only question at the trial of that issue is, whether the deed, whereof the tenor is set out, was executed by the defendant or not.” So in *Ross v. Parker* (c), it was held that if the defendant set out upon oyer a deed upon which the declaration is framed, he cannot, on demurrer, take advantage of a variance in an immaterial part between the deed as stated in the declaration, and as set out on oyer. *Sacheverell v. Froggatt* is also an authority in favor of the plaintiff; for, from that it appears that it is not because there is merely a variance

(a) 2 Saund. 367.

(b) 4 B. & C. 741; 7 D. & R. 249.

(c) 1 B. & C. 358; 2 D. & R. 662.

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between the covenant in the deed and that stated in the declaration that the defendant is at liberty to set out the whole deed on oyer and demur, but it is necessary that there should be such a variance as shows that the plaintiff has no cause of action on the deed. Here the plaintiff alleges that the defendant covenanted to pay, and the defendant, by setting out the deed, has shown how that payment was to be made; but he does not thereby negative the fact, that the defendant covenanted to pay the money, which is all that the plaintiff has alleged in his declaration; and the observations of *Bayley, J.*, in *Rowe v. Young*(a), fully support this declaration. "Another rule on the subject of demands (he says) I take to be this, that the fixing a special time and place for payment will not make an actual demand at that time and place necessary, as part of the plaintiff's title, in a case in which otherwise the demand would not be necessary; but that, in that case also, a tender or readiness to pay at the time and place is matter of defence, and of defence only. An award directs money to be paid at a given time and place. In an action on such an award, does the declaration allege any demand at that time or place?—certainly not. Upon an application *inde* for an attachment, is not the attachment constantly granted, though personal demand was not made at the time or place, and though attendance at the time or place is not stated?"

Lord ABINGER, C. B.—The observations of *Bayley, J.*, first quoted, appear to me to suppose that the covenant is properly set out. If the covenant stated in this declaration had substantially varied from that in the deed, so that the breach did not appear to be a breach of the covenant in the deed, I think the declaration would have been bad on demurrer; but, upon the whole, it appears to me that the covenant must be looked upon as general; and the plaintiff is therefore entitled to our judgment.

(a) 2 B. & Bing. 232.

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ALDERSON, B.—The covenant stated in the declaration is merely a covenant to pay; it may be either a covenant to pay generally, or at a particular place. If the covenant set out in the deed could be considered merely as a covenant to pay at a particular place, and at that place only, it would be a particular species of covenant, and there would be a material variance; but if it includes both a covenant to pay, as well as to pay at a particular place, then, looking at the deed and the declaration together, it appears to me that there is no material variance.

BOLLAND and GURNEY, Bs., concurred.

Judgment for the plaintiff.

MORRIS v. SMITH.

If the defendant appears after service of a writ of summons before the eight days are expired, the plaintiff may immediately after declare against him, without waiting till the eight days are expired.

BUSBY shewed cause against a rule which had been obtained by *Miller* calling upon the plaintiff to shew cause why the declaration should not be set aside for irregularity. The defendant had appeared to the writ of summons on the seventh day, and the plaintiff afterwards on the same day declared against him. It was contended, that as under the old practice the plaintiff might declare as soon as the defendant was in court, there was nothing to prevent the plaintiff declaring against the defendant, though the eight days had not expired.

Miller, being called upon by the Court to support the rule, contended, that, whatever might formerly have been the practice, such a declaration was irregular since the Uniformity of Process Act. Formerly a plaintiff might have declared *de bene esse*; but it was expressly decided in *Fish v. Palmer* (a), that a plaintiff had no right to declare *de bene*

(a) Ante, vol. 2, p. 460.

esse before the expiration of the eight days; and it was now contended, upon the construction of the 11th section of the Uniformity of Process Act, which directs that all necessary proceedings to judgment and execution may be had at the expiration of eight days from the service of the writ, that it was not intended to allow a plaintiff to proceed before; and that the defendant having the whole of the eight days within which to settle the action and pay the costs, he would be deprived of a portion of that time if the plaintiff could declare against him before it had expired. It was further contended, that it made no difference whether the defendant had appeared or not.

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LORD ABINGER, C. B.—It appears to me that this motion is too early. If the defendant, in consequence of not pleading within the time given him by the plaintiff, had had judgment signed against him, and afterwards moved to set it aside, the question would then have arisen, whether the plaintiff could reckon the time so as to include any portion of the eight days; but, upon general principle, I think the plaintiff's proceedings are correct.

BOLLAND, B.—The act gave eight days for the benefit of the defendant; and if he appears sooner than is necessary, I think he must be considered as waiving the remainder of the time.

ALDERSON, B.—The 11th section of the act does not appear to me to affect the question. That enactment was merely for the purpose of remedying the evil complained of, that no proceedings could be had in vacation upon writs returnable within four days of the end of any term; that is the inconvenience recited in that section, which was enacted for the purpose of remedying it. By the general law of the land, a plaintiff was always at liberty to declare when the defendant had appeared. Now, writs

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are returnable at the time of service, and the defendant has thought proper to appear before it was necessary; the plaintiff was therefore at liberty to declare against him, without waiting till the eight days had expired.

GURNEY, B., concurred.

Rule discharged with costs.

WILLIAMS v. WARING.

Where a defendant was charged in execution upon a writ indorsed to satisfy 188*l.* 9*s.*, and interest of 156*l.* until paid:—*Held*, that that was not such a misindorsement as to entitle the defendant to his discharge, but that the proper course was for the defendant to have moved to have the indorsement set right.

A writ to charge a defendant in execution was delivered to the under-sheriff's deputy in *London* within the second term: but was not delivered to the gaoler in the country till after the term:—*Held* that the defendant was regularly charged in execution.

MILLER shewed cause against a rule which had been obtained by *J. Jervis* for discharging the defendant out of the custody of the sheriff of *Denbighshire*, on two grounds: *first*, that he was not charged in execution within two terms after judgment signed; and *secondly*, that he was improperly charged in execution for an uncertain amount of interest. It appeared that the writ was delivered to the under-sheriff's deputy in *London*, in *Michaelmas* Term, which was the last of the two terms, and in time to have it sent to the gaoler at *Denbigh*, where the defendant was in custody, within the term, but the writ was not in fact delivered to the gaoler till the day after the term. The writ was indorsed to satisfy 188*l.* 9*s.*, and interest on the sum of 156*l.* until paid. It was contended, in answer to the rule, that there was nothing irregular at present, and that it did not appear that the defendant was charged in execution for too much; and that the delivery to the deputy in *London* in time was sufficient. On the other hand, it was contended, that taking the body in execution was a satisfaction, and that therefore, after that, interest could not run on; and that perhaps, in consequence of that wrong indorsement, the defendant might be detained in custody longer than he ought to be. It was also contended that the writ ought to have been lodged at the gaol within the term.

LORD ABINGER, C. B.—If the defendant was shewn to have been ready to pay or to have tendered what was due, we might have entertained this motion; but at present it appears to me that the proper application should have been to alter the sum indorsed on the writ to the amount properly claimable against the defendant; and that this rule cannot be sustained.

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GURNEY, B.—I am of the same opinion. The delivery of the writ to the sheriff's agent in *London* was sufficient.

BOLLAND, B., concurred.

Rule discharged, with costs.

LEIGH v. BENDER.

HEATON obtained a rule *nisi* for setting aside an interlocutory judgment signed in this term for want of a plea, on the ground that it had been signed too soon, and after a plea had been delivered.

The judgment signed in term for want of a plea, where the plea was delivered before eleven o'clock of the day after that on which the time for pleading expired:—*Held*, irregular.

Steer shewed cause.—The defendant had obtained time for pleading, which expired on the evening of *Monday*; the plea was not delivered, according to the affidavit of the defendant's attorney, till ten minutes before eleven o'clock in the forenoon of *Tuesday*: before that time the clerk of the plaintiff's attorney had left the office for the purpose of signing judgment, and the judgment was signed before he had any notice of a plea.

Heaton, in support of the rule, cited *Kemp v. Fyson* (a).

PARKE, B.—Judgment could not properly have been

(a) Ante, vol. 3, p. 265.

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signed before the opening of the office on *Tuesday* morning. I think the plea was delivered in time.

Lord ABINGER, C. B.—The judgment is irregular, because it was signed after the plea was delivered at the office.

Rule absolute, with costs.

SHORT, Assignee, &c. v. DOYLE.

Notice of render having been given to the plaintiff's attorney, he, notwithstanding took an assignment of the bail-bond and commenced proceedings, as no notice of bail had been given, and no entry of the render could be found upon searching the books:—*Held*, that the proceedings were irregular.

THIS was an action on a bail-bond by the plaintiff as assignee of the sheriff of *Middlesex*. *Barstow* having obtained a rule *nisi* for staying all the proceedings on payment of the costs of the assignment only,

Miller shewed cause.—He objected that the affidavit on which the rule was obtained was not properly intitled; the title of the cause being—*John Short*, assignee of *J. H. Esquire* and *T. W. Esquire*, Sheriff of *Middlesex*; in the affidavit the words “*Esquire*” were omitted. [The Court overruled this objection.] *Miller* then contended upon the affidavits that the proceedings were regular. The last day for putting in bail was the 1st of *June*, and no bail were put in. On the following day, notice of render to the *Fleet* was given, whereas the notice should have been for a render to the sheriff; and on the same day the defendant was rendered, but no notice of special bail having been put in was given, and the plaintiff's attorney was ignorant of it; and it is sworn that the books were searched, and no entry was found.

Barstow, in support of the rule.—Bail were put in merely for the purpose of rendering the defendant; and though the first notice was of a render to the *Fleet*, a new notice was afterwards given of a render to the sheriff, and

that the previous notice was given by mistake. After that notice, an assignment of the bail-bond was irregular; for, according to *Wilson v. Griffin* (a), where bail are put in merely for the purpose of a render, no notice of their having been put in is necessary; and in *Ellis v. Bates* (b) it was held to be irregular to sue out process on a bail-bond after the rule for the allowance of bail has been served, although the bail-bond has been forfeited and an assignment written for before a justification of the bail. On the authority of that case, the motion to stay proceedings might have been made without the terms of paying for the assignment, as it appears that it was taken after the notice was given.

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Per Curiam.—The rule must be absolute.

Rule absolute.

(a) 2 C. & J. 683.

(b) 2 C. & M. 143.

—◆—
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SEWELL moved for leave to enter an appearance for the defendant, against whom a distringas had been issued, and 40*s.* levied, as appeared by the sheriff's return; but the officer, he said, had refused to enter an appearance without an affidavit, which, he contended, was unnecessary, as there was nothing mentioned in the act (a) about an affidavit. The act merely directs that the distringas and notice, and the copy thereof, shall be served upon the defendant if he can be met with, or, if not, shall be left at the place where such distringas shall be executed. The notice served on the defendant expressly informs him, that, in default of his appearance within eight days after the return of the writ of distringas, the

After a distringas has been executed, and the sheriff has made his return that he has levied 40*s.*, an appearance may be entered by the plaintiff for the defendant without an affidavit.

(a) 2 W. 4, c. 39, s. 3.

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plaintiff will cause an appearance to be entered for him, and proceed thereon to judgment and execution.

The Court (consisting of PARKE, BOLLAND, ALDERSON and GURNEY, Barons) held that an affidavit was unnecessary, and directed that the officer should be informed of their opinion.

ROBERTS v. CUTTILL.

Judgment signed in *November*, 1833, plaintiff took no further step till *January*, 1835, when he gave a term's notice of executing a writ of inquiry. In *April*, notice of executing it for the 28th of *May* was served on the defendant in person. On the 27th of *May*, the defendant took out a summons to set aside the judgment for having been irregularly signed after plea delivered, returnable the next day at three o'clock, but it was not attended by the plaintiff's attorney. At four o'clock, the writ of inquiry was executed. On the same day a second summons was taken out, returnable the next day, which was attended and dismissed; and an application was then made to the Court to set aside the judgment and subsequent proceedings for irregularity:—*Held*, that the defendant was too late; and that the summons to set aside the judgment was not, under the circumstances, sufficient to stay the trial of the writ of inquiry.

PLATT shewed cause against a rule which had been obtained by *Knowles* for setting aside the judgment, and all other proceedings in this action, for irregularity. From the affidavits it appeared that judgment was signed in the month of *November*, 1833, but nothing was done till the 10th *January*, 1835, when the plaintiff gave a term's notice of executing a writ of inquiry, and in *April* gave another notice that a writ of inquiry would be executed on the 28th of *May*. It was contended, therefore, that, as the writ of inquiry had been executed on the 28th, and the defendant then appeared and took an objection that the judgment was two years old, and that it had been signed without a demand of plea, this application was too late.

Knowles, in support of the rule.—It is sworn that the defendant had no notice of the judgment being signed till the notice was given of executing the writ of inquiry; the judgment was clearly irregular, for it was signed after the

plea had been delivered; *secondly*, the notice of executing the writ of inquiry was irregular in two respects: *first*, it was irregularly intitled *Henry Taylor Roberts, Gent., one, &c.*, against *Richard Cuttill*; the name of the cause being *Henry Taylor Roberts v. Richard Cuttill*: and *secondly*, it was served by leaving it at the defendant's residence; but, as the defendant had appeared by attorney, and the declaration was delivered to the attorney, the notice also ought to have been delivered to the attorney; *thirdly*, the writ of inquiry was executed irregularly, for, a summons to set aside the judgment for irregularity was taken out on the 27th, returnable at three o'clock the following day, and the writ of inquiry was not executed till four o'clock on that day; and therefore, as the summons operated as a stay of proceedings from the time it was returnable, the writ of inquiry at all events ought to be set aside.

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Platt, as to the latter objection, contended, that, as the cause had been set down for the 28th, and might have been tried at eleven o'clock on that day, at which time the Court sat, the whole day must be taken together, it being merely from the accidental circumstance of other causes standing before it that it was not tried till after three o'clock on the 28th. A second summons was taken out at three o'clock on the 28th, which was duly attended and dismissed, and therefore it appeared that there was no ground for the application. With respect to the service of the notice of the writ of inquiry being on the defendant himself, it was sworn that the defendant's attorney could not be found; and any objection on that account was too late.

PARKE, B.—The notice of executing the writ of inquiry was not, I think, irregular, on account of the alleged objection that it was misintituled; and, though it may

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have been irregular from its being served on the defendant instead of his attorney, I think it was a sufficient service to have put the defendant in motion, and that, having delayed so long, he is now too late. With respect to the irregularity in executing the writ of inquiry after the first summons was returnable, though that summons was certainly a stay of proceedings from the time it was returnable, yet, as the plaintiff was alleged to have attended for the purpose of trying the writ of inquiry at eleven o'clock, and he was then perfectly regular, I think that it must be considered to have been then an inchoate act, and that the mere accident of the inquiry not coming on till afterwards, did not make it irregular. I therefore think the rule should be discharged. The defendant does not say that he did not know of the judgment being signed, although he might very well have known it without notice.

BOLLAND and GURNEY, Barons, concurred.

Rule discharged, with costs.

MACK v. RUST.

To a declaration containing the common counts the defendant pleaded, as to part, that he was not indebted, and as to the residue, that he paid it before the commencement of the action, and concluded to the country. Upon special demurrer to the latter plea:—
Held, bad.

THIS was an action of debt for goods sold, work and labour, money paid, and on an account stated. The aggregate of the four counts in the declaration was 80*l.*, and the plaintiff alleged that the defendant promised to pay that sum upon request. The defendant pleaded, as to all but 40*l.*, that he was not indebted to that amount; and as to that sum, he pleaded, in the second plea, that, before the commencement of the suit, he “paid to the said defendant the said sum of 40*l.*, parcel, &c.,” and the plea concluded to the country. The plaintiff demurred specially; the causes assigned being that the defendant did not, in the second plea, aver that he paid the money *on request*, or that he paid it

or that the plaintiff received it in satisfaction of the like sum in the declaration and of the damages sustained by reason of the detention thereof; that the plea was uncertain in not shewing whether the money was paid in performance of the contract, or, after request, in satisfaction of the debt and damages; and that it should have concluded with a verification, and not to the country.

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Gunning, in support of the demurrer.—The plea is bad, because it does not aver that the money was paid upon request; and therefore, consistently with the plea, the contract may have been broken, as charged in the declaration; neither does it amount to accord and satisfaction. *Ansell v. Smith* (a) is an authority that the plea is bad on that ground, and also for not concluding with a verification.

LORD ABINGER, C. B.—Upon the authority of that case the plea is clearly bad. If the money had been paid into Court in the usual way, the defendant must have paid the costs: if this plea were good, the plaintiff would be deprived of his costs.

ALDERSON, B. concurred.

Judgment for the plaintiff.

Sir *W. Follett*, for the defendant, afterwards obtained leave to amend on payment of costs.

(a) Ante, Vol. 3, p. 193.

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SMITH v. JOHNSON.

A *fi. fa.* having been delivered to the sheriff's officer on the 23rd of April, on the following day, the officer wrote a letter stating that the defendant was only a lodger, and had no effects. In consequence of which letter, the plaintiff on the succeeding day lodged a *ca. sa.* with the sheriff's deputy in London. On the 29th, the plaintiff having heard that the defendant had goods, and that the letter of the officer was false, wrote to the officer, directing him not to arrest the defendant, but to take his goods; and, on the 1st of May obtained a side bar rule for a return of the writ of *fi. fa.* The sheriff applied to discharge that rule on the ground that the *fi. fa.* was superseded by the *ca. sa.* subsequently issued:—*Held*, that, whether it was so or not, the plaintiff had a right, under the circumstances, to have a return to the *fi. fa.*

KELLY and *Theobald* shewed cause against a rule *nisi* which had been obtained by *W. H. Watson* on behalf of the Sheriff of *Bedfordshire*, calling upon the plaintiff to shew cause why a side-bar rule obtained by the plaintiff for a return to a writ of *fi. fa.* should not be discharged with costs. From the affidavits, it appeared, that, on the 23rd of April a *fi. fa.* was issued, and sent to the sheriff's officer in the county to execute; that, on the 24th, a letter was received from the officer, stating that the defendant was only a lodger, and that he had no effects on which he could levy; in consequence of which letter, a *ca. sa.* was issued and sent to the officer; but the plaintiff having afterwards learned that the letter was not true, and that the defendant had goods, wrote to the officer on the 29th, telling him, that, if he had not arrested him on the *ca. sa.*, he was not to arrest him, but to take his goods; and, on the 1st of May, a side-bar rule was obtained for returning the writ of *fi. fa.* The objection made on behalf of the sheriff was, that, having had a *ca. sa.* afterwards delivered to him, he was not bound to make a return to the *fi. fa.* The affidavits, in answer to the rule, charged collusion between the sheriff's officer and the defendant, and alleged that the representation made in that letter by the officer was a wilful misrepresentation, because, a short time previous, the same sheriff's officer having had a writ against the defendant's goods, had seized a quantity of goods at the defendant's house, which had been given up to the defendant on that execution being settled. But, independently of the fact of collusion, it was contended that the second writ did not necessarily supersede the first writ; and *Miller v. Parnell* (a) was cited, where the Court say—"The plaintiff may,

(a) 6 Taunt. 370.

by the practice of the Court, sue out both processes together if he will, and may use either the one or the other, as he sees advisable; but, by using the *fi. fa.* first, he makes his election, and, after having so elected, he cannot use the other process till after the return of the first." "No doubt a plaintiff having sued out a *fi. fa.* may, if he pleases, omit to execute the *fi. fa.*, and take out a writ of *ca. sa.*, and execute that before the *fi. fa.* is returned or returnable:" and, in *Primrose v. Gibson* (a), it was expressly decided that a plaintiff may issue a *fi. fa.* and *ca. sa.* together, and that the sheriff may execute either of them.

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PARKE, B.—When two writs are sued together, it is understood to mean that the sheriff is to execute one or other of them, whichever he can; but, when a *ca. sa.* is sent subsequently to a *fi. fa.* being sent, does not that imply a direction to the officer not to execute the first writ?

Kelly.—Here the sheriff had the *fi. fa.* in his possession for a period of time during which we say he might have executed it. If the officer has been guilty of a neglect of duty during that time, the sheriff is liable for the officer's neglect, and the plaintiff is entitled to have a return. There is no case to shew that one writ suspends or supercedes the other; and, without an express countermand, there is nothing to relieve the sheriff from his duty on both. No express directions were given with the *ca. sa.*; and, when a sheriff is in possession of two writs, he ought to execute that which will be most for the plaintiff's advantage; but here he has executed neither. The *ca. sa.* was delivered to him on the 25th, and, between that time and the 29th, it is sworn, that the defendant was seen

(a) 2 D. & R. 193.

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several times about, and might have been taken on it, but that the officer neglected to enforce it.

W. H. Watson, in support of the rule.—The cases of concurrent writs do not bear upon the present question. The officer had no opportunity of executing the *fi. fa.*, for, immediately on receiving the writ, he wrote to say that the defendant had no goods, and, directly on the receipt of that letter, a *ca. sa.* was lodged with the deputy in *London*. A *ca. sa.*, when it is lodged with the deputy, is necessarily a countermand of the *fi. fa.*, or else it should have been distinctly pointed out that it was not intended to be so; otherwise the sheriff would be in this danger—that, supposing in any part of *Bedfordshire*, a defendant was in the custody of any officer of the sheriff, he would be also in the custody of the sheriff in any action in which the writ was lodged. In *Arundel v. Chitty* (a), the defendant being in the custody of the sheriff in another action, the plaintiff in that action sent a *ca. sa.*, with directions that it should not be executed until further orders, unless he was in custody on a prior writ. The defendant, as it afterwards appeared, was illegally in the custody of the sheriff on a previous writ, and ought to have been discharged; but the sheriff, conceiving that the lodging of the second *ca. sa.* operated as a detainer, refused to discharge him; and on application being made to discharge him, *Littledale, J.*, held that the defendant was properly in custody on the second writ, that he was in custody at the time the *ca. sa.* was lying in the hands of the under-sheriff, and that by operation of law the writ attached from the time he was in custody, though at the suit of another. The sheriff might, therefore, possibly in this instance, have had the defendant in custody upon the *ca. sa.*, and therefore he ought not to be compelled to take the goods under the *fi. fa.*

(a) Ante, Vol. 1, p. 499.

LORD ABINGER, C. B.—I think this rule should be discharged with costs. It is unnecessary to determine whether a *ca. sa.* would countermand a *fi. fa.* previously issued; but it was clearly the duty of the officer to have seized the defendant's goods at any time that he could have done so during the running of the writ, or he might have executed which of the two writs he thought would be of most advantage to the plaintiff.

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PARKE, B.—Whether or not the lodging of a *ca. sa.* operates as a supersedeas of a *fi. fa.* previously delivered, it is unnecessary now to say, for, even supposing that this *ca. sa.* was issued with the intention that it should so operate, there was a period of time during which it now appears that the sheriff ought to have executed the *fi. fa.*, and I think the plaintiff ought to have an opportunity of trying that question, which he cannot do without a return. On the affidavits, there is strong ground to suspect that the letter was false, and that there was fraud on the part of the officer; but, even supposing that there was no fraud, and that his conduct was perfectly innocent, still the plaintiff ought not to be shut out of the time which passed before the *ca. sa.* was delivered, and he has a right to know what was done during that time. The argument derived from the case of *Arundel v. Chitty* would apply equally to the case of concurrent writs.

BOLLAND, B.—No doubt a plaintiff is entitled to issue both writs, and to have either of them executed. *Miller v. Parnell* is an authority to that point. Having a right to issue both writs, has any thing been done by him to deprive him of the benefit of one of them? When the *ca. sa.* was issued, no directions were given not to execute the *fi. fa.*, nor was the latter writ withdrawn; and therefore he had a right to have either the one or the other executed, as was decided in *Primrose v. Gibson*.

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GURNEY, B.—The sheriff must be answerable for the act of his officer. When he made the present application, he must have suppressed material information from the Court. The rule must therefore be discharged with costs.

Rule discharged, with costs.

WILSON v. NORTHERN.

In the *Exchequer*, where the defendant gives a cognovit, the costs may be taxed before judgment is signed; and if, by the terms of the cognovit, the plaintiff is at liberty to tax costs and sign judgment, but signs his judgment before the costs are taxed, the judgment is irregular.

W. H. WATSON moved to set aside an order of *Gurney, B.*, which had been made at chambers under these circumstances:—The defendant had given a cognovit for the debt sought to be recovered, payable on the 16th of *April*, and, if not paid, the costs were to be taxed, and judgment signed. The plaintiff signed judgment on that day, and, having given notice of taxation, taxed the costs on the same day, and judgment was entered up for the debt and costs. A summons was taken out to set aside the judgment, as having been irregularly signed before the costs were taxed, which was heard before Mr. Baron *Gurney*, who ordered the judgment to be set aside with costs. It was now contended that the judgment was regular, and that the master could only tax the costs upon the judgment; and that, as no tender of the defendant's costs had been made, the costs of the judgment ought not to be thrown upon the plaintiff.

LORD ABINGER, C. B.—As the agreement was to tax the costs and sign judgment, the judgment ought not to have been signed before the costs were taxed.

ALDERSON, B.—The proper course is, to tax the costs, and if they are not paid on the day appointed, you take judgment for the whole.

GURNEY, B.—If a cognovit is payable at a certain day, the costs may be taxed without signing judgment; and the master says that the practice is not, as has been suggested, that the costs can only be taxed upon the judgment. The rule must therefore be refused.

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Rule refused.

WILSON v. PRICE.

ARCHBOLD moved that the defendant, who was in custody under a cognovit, might be discharged on entering a common appearance. From his affidavits it appeared that the defendant was arrested in *London*, and sent to *Staffordshire* upon a charge of obtaining money under false pretences; that the charge, however, not being sufficiently made out, the magistrates there set him at liberty, and, as he was returning, he was arrested at the suit of the same party who preferred the charge for 150*l.*, and after remaining in prison for some months, he gave a cognovit, and also certain money and goods to the plaintiff at the same time. He objected to the cognovit that the rule of 1 Reg. Gen. *Hilary Term, 2 Will. 4, s. 72 (a)*, which requires that there should be an attorney present on behalf of the person in custody who gives the cognovit, expressly named by him, and attending at his request, and which attorney shall subscribe his name as a witness, and declare himself to be attorney for the defendant, and state that he subscribes as such attorney, had not been sufficiently complied with. Here the attorney had merely subscribed himself thus—"Witness to the signing of the said *E. Price, C. D.*, attorney for the said defendant;" but it did not go on to say that he declared himself as the at-

It is a sufficient compliance with the rule of 1 Reg. Gen. *H. T. 2 Will. 4, s. 72*, if the attorney who is called in by a defendant in custody to witness a cognovit, makes the declaration required by the rule *visu voce*.

Where a defendant is in custody upon a cognovit, which it is alleged has been satisfied, the Court will refer it to the Master, to see whether there is any thing due upon it, but will not order the defendant to be discharged.

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torney, and that he subscribed himself as such attorney. And he referred to a case of *Fisher v. Nicholas*, (a) where *Bolland*, B., under similar circumstances, expressed an opinion that the declaration by the attorney required by the rule ought to be put in writing upon the cognovit; and, secondly, he contended, that as there was reason to believe from the affidavits that the plaintiff had been sufficiently paid by the money and goods deposited at the time, and that the cognovit had been improperly extorted from him, he ought to be discharged on entering a common appearance.

PARKE, B.—I think there is nothing in the first objection, and that it is a sufficient compliance with the rule if the attorney makes the declaration there required *videlicet*. Upon the other ground, I think that the defendant is not entitled to enter a common appearance, because he is properly in custody on the cognovit; all we can do is, to refer it to the Master to see if any thing and how much is due, and he may report to the Court.

LORD ABINGER, C. B., BOLLAND and GURNEY, Bs. concurred.

Rule accordingly.

(a) Ante, Vol. 2, p. 251.

MOORE v. ARCHER.

A writ was to answer the plaintiff "in a special action," the declaration was "on promises." A rule to set aside the declaration for irregularity was discharged with costs.

WHITEHURST shewed cause against a rule which had been obtained by *Channell*, calling upon the plaintiff to shew cause why the declaration should not be set aside for irregularity. The writ was to answer the plaintiff "in a *special action*" at the suit of *George Moore*. The declaration delivered upon that writ was "on promises."

LORD ABINGER, C. B.—The declaration is not irregular.

The motion should have been to set aside the writ; the rule must be discharged.

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The rest of the Court concurred.

Rule discharged with costs.

PENN v. WARD.

TRESPASS. The declaration stated that the defendant, on the 1st day of *August*, 1834, with force and arms, &c., assaulted the said plaintiff, and then and there, with great force and violence, seized, and laid hold of, and pulled about him the said plaintiff; and, with his fists, gave and struck the said plaintiff a great many violent blows and strokes on and about his back, breast, loins, shoulders, arms, and divers parts of his body; and also then and there, with great force and violence, again seized, laid hold of, and shook, and pulled about him the said plaintiff, and, with his fists, again gave and struck the said plaintiff a great many other violent blows and strokes on and about his head, face, breast, back, shoulders, loins, arms, legs, and divers other parts of his body; by means of which said several premises, he, the said plaintiff, was then and there greatly hurt, and bruised, &c.

In trespass for assault and battery, the defendant pleaded that the plaintiff was his apprentice, and that he behaved saucily and contumaciously, wherefore the defendant moderately corrected him: the plaintiff replied *de injuria*. The jury found the plea, but the correction excessive, and gave one shilling damages.—*Held*, that, upon that issue, the question of excess was not raised, and that it should have been new assigned.

Pleas—1st, Not guilty. 2ndly, And for a further plea in this behalf, the defendant says, that, before and at the time when &c. in the declaration mentioned, the said plaintiff was the apprentice and servant of the defendant, in his trade and business of a boot and shoe maker, and then behaved and conducted himself saucily and contumaciously towards the defendant, and then refused to obey his lawful commands relating to his duty as such apprentice and servant as aforesaid; whereupon he, the said defendant, then moderately corrected the said plain-

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tiff for his said misbehaviour, doing no unnecessary damage to the said plaintiff; which are the supposed trespasses in the said declaration mentioned. And this the defendant is ready to verify, &c.

Replication.—To the first plea, *similiter*.—And the plaintiff, as to the plea of the defendant by him lastly above pleaded, saith, that he, the defendant, of his own wrong, and without the cause by him in that plea alleged, committed the several trespasses in the said declaration mentioned. And this the plaintiff prays may be inquired of by the country, &c.

At the trial before *Tindal*, C. J., at the last assizes for *Warwick*, the plaintiff obtained a verdict, damages one shilling; the learned judge said it seemed to him that the beating complained of arose out of a quarrel; the jury, however, found that the beating was given by way of correction; and, on the ground of disproportionate punishment, gave the plaintiff a verdict for one shilling. A rule *nisi*, for entering a verdict for the defendant, or for a new trial, having been obtained, on the ground that excess could not properly be given in evidence on the issue—

Humfrey and *Miller* shewed cause.—The jury have found that the punishment was disproportionate, and therefore the plea is not proved, for, it is there alleged that the defendant *moderately* corrected the plaintiff, and that is a material allegation. The plea of *de injuriâ*, therefore, as it puts in issue all the matters stated in the plea, necessarily put in issue the fact that the defendant moderately chastised the plaintiff, and, at all events, this replication is good after verdict, according to a case in *Gilbert's C. P. (a)*, which is thus stated: "In an action of assault and battery, the defendant pleads that the plaintiff neglected his service, *per quod moderate castigavit*:

the plaintiff replies *quod non moderate castigavit*; and the issue was found for the plaintiff; for, though this be an informal traverse, and bad on demurrer, being rather a traverse of the punishment than of the moderate manner of doing it, and the right traverse should have been *de injuriâ sud propriâ absque tali causâ*, yet, after verdict, it is good, because the jury have ascertained that he did beat him immoderately." And in the late case of *Reece v. Taylor* (a), it is said to have been held, that the question of excess does not arise till all the material allegations in the plea have been proved, and that evidence of acts consistent with the declaration, but not within the justification, may be given in evidence under *de injuriâ*; and in *Cockcroft v. Smith* (b), in trespass for assault, battery, and maiming, to which the defendant pleaded *son assault demesne*, it seems to have been considered, that, if a greater degree of violence is proved to have been used by the defendant than was necessary for his defence, the defendant cannot justify himself under that plea. In *Phillips v. Howgate* (c), the first count of the declaration stated that the defendant assaulted and imprisoned the plaintiff, and, during such imprisonment, struck, pulled, and pushed him about. The plea was, that the defendant arrested the plaintiff under process of the court, and that the plaintiff, whilst in custody, having conducted himself in a violent manner, the defendant necessarily, and to prevent his escape, struck, &c.; and it was held, that, this latter part of the justification not being proved, the plaintiff was entitled to judgment, and that it was not necessary to new assign the battery by the defendant. In that case Mr. Justice Bayley says, "The plea of the defendant, if true, would have been a good justification, and, as it seems to me, it was necessary to allege the misconduct of the plaintiff, in order to justify the pushing and striking by the defen-

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(a) 1 Harr. 15.

(b) 2 Salk. 642.

(c) 5 B. & Ald. 226.

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dant: for, if it had omitted such an allegation, the plea would have been demurrable. The justification, though well pleaded, was not sufficiently proved, and the plaintiff, therefore, was entitled to a verdict." So, in the present case, the plea consists of three propositions,—1st, That the plaintiff was an apprentice; 2nd, That he was contumacious; and, 3rd, That the defendant moderately punished him: the latter part of the plea being disproved, the plaintiff was entitled to a verdict without replying excess.

Adams, Serjt., and *Hayes*, in support of the rule, were stopped by the Court.

BOLLAND, B. I am of opinion that this rule must be made absolute. It appears to me that the replication of *de injuriâ* merely puts in issue whether the defendant, as the master of the plaintiff, who was his apprentice, had a right to administer correction to him for his contumacy; instead, therefore, of replying *de injuriâ* the plaintiff should have admitted that the defendant was justified in correcting him, but should have new-assigned the excess, and that would have raised the real question between the parties, which he could not do as the pleadings at present stand; and I may add, that the learned judge who tried the cause is now of that opinion.

ALDERSON, B.—I am of the same opinion. The replication *de injuriâ* merely puts in issue the *cause* stated in the plea. In *Phillips v. Howgate*, the defendant justified the battery which he was unable to prove. The plaintiff, by the replication of *de injuriâ*, says, in fact, that there was no cause at all for the punishment. That was admitted to be so in *Lamb v. Burnett (a)*. It appears to me that the question 'whether the correction was moderate or not' does

(a) 1 Crompt. & J. 291; 1 Tyr. 265.

not form part of the 'cause' stated in the plea, which is the only thing put in issue by the replication; the defendant proved the cause stated in the plea; and the plaintiff was not entitled to a verdict for the excess, without replying it. The rule, therefore, must be absolute for a new trial, but not for entering a verdict for the defendant.

GURNEY, B. concurred.

Rule absolute for a new trial.

BLUNT v. BEAUMONT.

TRESPASS.—The declaration alleged that the defendant "assaulted the plaintiff, and wrenched and pulled a certain stick from the plaintiff's hands, and with the said stick and defendant's hands and fists gave and struck the plaintiff many and violent blows and strokes, and shook and pulled about the plaintiff, and gave and struck him many other blows and strokes." Plea *first*, general issue—*2dly*, "as to the assaulting the plaintiff with the said stick and with his, defendant's, hands and fists giving and striking the plaintiff blows and strokes as in the declaration mentioned, and as to the shaking and pulling about the plaintiff as in the declaration mentioned," &c., *son assault demesne*. At the trial at the *Middlesex* Sittings in *Trinity* Term, before *Parke*, B., the plaintiff proved his case, and the defendant called several witnesses (to whom the jury gave credit) to prove that the defendant did not wrench the stick from the plaintiff's hands, and that the plaintiff was the first aggressor. It was contended on behalf of the plaintiff that he was at all events entitled to some damages for the blow with the stick, which was not justi-

To a declaration in trespass for assaulting the plaintiff and giving and striking him blows and strokes with a stick and with said defendant's hands and fists, the defendant pleaded, "as to the assaulting the plaintiff with the said stick and with his the defendant's hands and fists giving and striking the plaintiff blows and strokes as in the declaration mentioned" *son assault demesne*. At the trial, it was proved that the defendant struck the plaintiff a blow with his stick, which it was objected the plea did not cover: but—

Held, that the plea sufficiently shewed that the blow with the stick was intended to be justified by the plea, and therefore that it covered the declaration.

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fied; and the learned Judge, after some hesitation, desired the jury to assess the damages for that blow which had been proved by the plaintiff's and not been denied by the defendant's witnesses, and gave the plaintiff leave to move to enter a verdict for that amount on the general issue, in case the Court were of opinion that it was not covered by the special plea.

Wallinger now moved accordingly for a rule to shew cause why a verdict on the general issue should not be entered for the plaintiff with 1s. damages. The blow, *i. e.* the battery with the stick, was clearly proved by the plaintiff's witnesses, and the defendant does not justify it by his special plea; that plea only professes to answer the assaulting with a stick, and an assault does not amount to a battery. [Lord *Abinger*, C.B.—The plea is, as to assaulting with the stick as in the declaration mentioned.]—The legal import of those expressions is “as to so much of the battery with the stick” in the declaration mentioned as amounts to an assault with the stick, leaving all of the battery that is *plus* the assault entirely out of the justification: as, to a declaration for 100*l.*, the plea might be as to 50*l.*, in the declaration mentioned, meaning as to so much of the 100*l.* as amounts to 50*l.* And that there is a difference between an assault which is only an inchoate violence or an attempt, and a battery, is shewn by all the books which treat on the subject (*a*). The words “as in the declaration mentioned” would be inserted, even if defendant intended to justify only the assault. There are cases both in pleadings and after verdict where the distinction is made between an assault only and a battery; in *Page v. Creed* (*b*)

(*a*) Buller, N. P. 15; Selw. N. 335; *Jerome v. Phear*, Cro. Eliz. P. 278; 3 Bl. Comm. 120. See 93; *Purcell v. Bradley*, Yelv. 46. also *Wilson v. Dodd*, 2 Bulstr. (b) 3 Term Rep. 391.

the assault was justified, and the battery denied; and in *Smith v. Neesum* (a) the Judge certified that an assault only was proved, which was held insufficient to give costs under the statute of *Car. 2*. Nothing is to be intended in favour of a plea: there is no mode of construing the plea as the defendant would desire it, without confounding a battery with an assault, or introducing a word or a stop; but the construction contended for on the part of the plaintiff is the natural and grammatical construction, requiring no insertion and raising no doubt, and even if there were a doubt, the plaintiff is entitled to the benefit of it, for every plea shall be taken most strongly against the pleader (b); as, where a release was pleaded, not saying whether before or after the trespass, it was held to import that it was before the trespass, and therefore was no answer (c).

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LORD ABINGER, C. B.—If the meaning was uncertain, the defendant might have specially demurred.

PARKE, B.—The meaning of the plea is sufficiently clear; by suspending the breath after the word plaintiff, the same construction would be given as if the word *and* were there; and that is the construction that must have been intended, for there was nothing in the case to lead to a supposition that the defendant did not intend to justify the battery with the stick as well as the assault with it. It appears to be a mere clerical error in leaving out the word “and.”

Rule refused.

(a) 2 Levinz, 102.

(b) See Co. Litt. 303 a.

(c) Bro. Abr. 69, tit. Pleading;
Plowd. Rep. 46.

1835.

**DOE d. CHURCHWARDENS and OVERSEERS of the Parish
of LLANDESILIO v ROE.**

A declaration in ejectment on the demise of the churchwardens and overseers of a parish, to recover parish property, contained two sets of counts; one specifying the names of the individuals, and the other not. The Court ordered one set to be struck out. *Held*, also, that a motion for that purpose, involving a point of law and the construction of an act of parliament, was properly brought before the full Court.

RAWLINSON obtained a rule *nisi* for striking out the first three counts of the declaration in this action, which was an ejectment by the officers of the above-named parish, to recover certain premises alleged to be the property of the parish. There were six demises laid in the declaration. The first three by the churchwardens and overseers, without mentioning any of their names. The last three specified the names. The rule was obtained on the ground, that, though the statute 59 *Geo. 3*, c. 12, s. 17, vests all buildings, &c., in the churchwardens and overseers, and allows them to sue in a corporate capacity, yet it expressly enacts that in all actions and suits the churchwardens and overseers for the time being are to be named and described as overseers, &c.; and further provides, that no action shall abate in consequence of the death of any of the churchwardens or overseers so named in such proceedings; thus clearly shewing that the legislature intended that the names of the persons claiming as overseers, &c., should appear upon the face of the declaration. The cases of *The King v. All Saints, Derby* (a), and *Woodcock v. Gibson and Others* (b), were referred to, to shew that nothing would vest in these churchwardens and overseers unless a proper number of such officers were regularly appointed; and under the general description adopted in the declaration, the defendant could not ascertain that material fact.

John Jervis was heard against the rule, and, amongst other things, contended that this motion should have been

(a) 13 East, 143.

(b) 6 D. & R. 524; 4 B. & C. 462.

made before a Judge at chambers, instead of being brought before the full Court.

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ALDERSON, B. (a)—Such cases as the present, involving points of law or the construction of statutes, are very properly brought before the Court; in fact, such motions ought not to be taken before a Judge at chambers. The rule must be absolute.

Rule absolute, with costs.—Leave to amend.

(a) Sitting alone on the last day of term.

*See May v. Burdett 9. Q. B. 101.
Lord v. Carr. 5. Exh. 509 L.C. 5. C.B. 622.
Hudson v. Roberts. 20. L.J. Exch. 299.*

THOMAS v. MORGAN.

Reported also 2. L. M. & R. 196.

THIS was an action on the case; and the declaration alleged that the defendant wrongfully kept divers dogs, which bit and worried the plaintiff's cattle, the defendant well knowing that the said dogs were of a ferocious and mischievous disposition, and used and accustomed to chase, bite, worry, and kill cattle. The defendant pleaded, *first*, not guilty; *secondly*, that no dog or dogs of the defendant's bit or worried the plaintiff's cattle. At the trial before *Williams, J.*, it was proved that the defendant's dogs had attacked and bit cattle of the plaintiff's; and some evidence was given to prove the knowledge of the defendant that his dogs were accustomed to bite, &c. It was objected, for the defendant, that the evidence of the *scienter* was not sufficient. It was contended on the other side, that the *scienter* was admitted by the pleadings. The learned Judge, being of opinion that the *scienter* was not sufficiently proved, nonsuited the plaintiff, but gave him leave to move.

In case for an injury done to the plaintiff's cattle by the defendant's dogs, the plea of not guilty puts in issue the fact, not only that the defendant's dogs injured the plaintiff's cattle, and that the dogs were of a savage disposition, but also that the defendant *knew* them to be so.

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Chilton now renewed the objection, and contended that the *scienter* was a material allegation, which was not put in issue by the plea of not guilty; and that that plea merely put in issue the wrongful act of which the plaintiff complained—that his cattle were bit and injured by the defendant's dogs. He cited *Frankum v. Earl of Falmouth* (a).

LORD ABINGER, C. B.—The wrongful act charged against the defendant is, that he kept the dogs with a knowledge of their disposition, and that the plaintiff sustained an injury in consequence. Not guilty, therefore, puts the *scienter* in issue.

ALDERSON, B.—In *Frankum v. Earl of Falmouth*, the wrongful act complained of was the diversion of the water. The Court held that the plea of not guilty did not put in issue the right to divert the water as not being part of the wrongful act, for no proof was necessary that the defendant did the act wrongfully; but here, unless the defendant had a knowledge of the disposition of the dogs, he is not liable to an action.

The other Barons concurred.

Rule refused.

(a) *Ante*, p. 65.

TUNNO v. MORRIS, Esq.

The sheriff is not liable in trespass for the act of the bailiff of a county court in taking the goods of a stranger, upon process directing him to take the defendant's goods.

TROVER for cattle, goods, and chattels.

Plea.—That, before and at the said time when &c. the said defendant was sheriff of the county of *Carmarthen*, and

that one *John Meredith*, residing within the jurisdiction of the county court holden in and for the said county, had been, by virtue of his Majesty's writ of *justicies*, summoned before the suitors of the said court, to answer *Henry Thomas*, also residing within the same jurisdiction; and that, according to the custom of the said court, the said *Henry Thomas* levied his plaint against the said *John Meredith* of and concerning a certain cause of action arising within the said jurisdiction, and such proceedings were thereupon had, that afterwards the said *Henry Thomas* recovered against the said *John Meredith* 63*l.* for his debt, and 4*l.* 16*s.* 5*d.* for his damages in that behalf sustained; and that the said defendant, so being such sheriff as aforesaid, afterwards, to wit, on the 19th day of *May*, 1834, at the suit and instance of the said *Henry Thomas*, authorized and commanded all and singular his bailiffs, and also *William Harris*, *David Davies*, and *John Gaunt*, special bailiffs for that purpose appointed, and each and every of them, to levy of the goods and chattels of *John Meredith* in the county of him the said defendant, as well the said debt of 63*l.* which the said *Henry Thomas* in the said county court, held in and for the said county, had recovered against the said *John*, as also 4*l.* 16*s.* 5*d.* which to the said *Henry* in the same court had been adjudged for his damages which he had sustained by occasion of detaining that debt, whereof the said *John* was convicted; and to have that money at the next county court to be holden in and for the said county, to render to the said *Henry* for his debt and damages aforesaid, together with the said precept; which said precept was delivered to the said *William Harris*, *David Davies*, and *John Gaunt*, as such special bailiffs as aforesaid, to be executed in due form of law; and by virtue of the said precept, the said goods in the said declaration mentioned, were by them seized: which is the same supposed conversion whereof the plaintiff hath above thereof complained against the said defendant: and this the defendant is ready to verify.

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General demurrer and joinder.—The cause stated in the margin of the demurrer was, that “The plea does not justify seizing the plaintiff’s goods, but only those of *John Meredith*.”

Crowder, in support of the demurrer.—The sheriff is not a judicial but a ministerial officer, for the purpose of executing the process of the county court, as he is of the superior courts; he is therefore answerable for the act of his officer in seizing the goods of the plaintiff instead of those of *John Meredith*. It is expressly laid down in *Jentleman’s case* (a), that the sheriff in the county court, when the plea is by writ of *justicies*, is not a judge of the court, but the suitors only are the judges. In *Com. Dig. tit. County Court* (C. 13), it is laid down, that, if the sheriff delays execution, a writ *de executione judicii* may be directed to him out of *Chancery* to do execution, and thereupon an *alias*, and *pluries*, and attachment against the sheriff. The sheriff therefore being personally liable if execution is not done, he is equally responsible if execution is done improperly. So, the sheriff has no power over the bailiff of a liberty, but he may appoint his own officer; and if he does, he is liable to an action. A sheriff is liable for the acts of his officers, because he appoints them and directs them to act by process; so he does in the present case.

Lord ABINGER, C. B.—The plea amounts to the general issue.

Chilton, in support of the plea.—It is not made a ground of demurrer to the plea that it amounts to the general issue; and this is one of those cases where the defence, though sufficient under the general issue, may also be pleaded specially. The sheriff of the county court, when the proceeding is by *justicies*, is a constituent part of the

(a) 6 Co. 11 a.

court, and therefore not liable to an action, upon the principle of the case of *Holroyd v. Breare* (a), where it was held that the steward of a court baron is a judicial officer, and that trespass would not lie against him where his bailiff, by mistake, took the goods of *B.* under a precept commanding him to take the goods of *A.* So, in *Tinsley v. Nassau* (b), it was held by *Best*, C. J., that the sheriff of the county court is not liable in trespass for the act of a bailiff of that court in taking the goods of *A.* under process against *B.* Those cases are precisely in point.

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Crowder, in reply.—In *Holroyd v. Breare*, *Jentleman's* case was not cited. The Court, in *Holroyd v. Breare*, proceeded on the ground that the steward of a court baron is clothed with something of a judicial character: but, in *Jentleman's* case, it was expressly determined that the suitors alone are the judges, and not the sheriff.

LORD ABINGER, C. B.—This plea certainly amounts to the general issue; but that is not made a ground of demurrer. *Holroyd v. Breare* and *Tinsley v. Nassau* appear to me to be exactly in point. Where the action is in the superior courts, the process of execution is directed to the sheriff, and he is commanded to cause the money to be made, and to have the money in court: but, in the county court, the process is directed at once to the bailiffs. The bailiff is commanded by the Court, and he makes his return to the court. The county court is the sheriff's court; and, though not judge, the sheriff is as much a part of the court as the suitors. There is another distinction—that in a common case, all securities are given to the sheriff; but it is not so in the county court. The plea therefore is a good answer to the action.

BOLLAND, B.—*Holroyd v. Breare* is not inconsistent

(a) 2 B. & Ald. 473. (b) M & M. 52.

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with *Gentleman's* case. The sheriff in his county court is an essential part of the court.

ALDERSON, B.—In the superior courts, the sheriff is ordered to seize the defendant's goods, and he deposes an officer to do so for him, instead of executing the process in person, as he might do; but, in the county court, the sheriff is never ordered to execute the process himself; but, being a part of the court, the court orders the bailiff to act.

GURNEY, B., concurred.

Judgment for the defendant.

NOEL v. RICH.

To a declaration on a bill of exchange, which alleged that the defendant drew the bill and indorsed it to one N., who indorsed it to J. S., who indorsed it to the plaintiff, the defendant pleaded, that his indorsement was in blank, and that he did not deliver the bill to N., but to one L. L., and that L. L. held the bill for the purpose of getting it discounted for the defendant; but, instead of doing so, indorsed it to E. F.

without discounting it for the defendant; and that the plaintiff took the bill from E. F. with a knowledge of these facts. The plaintiff replied that the defendant broke his promise without the cause mentioned in the plea, and concluded to the country:—*Held*, that the plea was bad in substance, for want of an averment that no consideration had passed either directly or indirectly to the defendant. *Held*, also, that the replication was good in substance.

ASSUMPSIT on a bill of exchange by the plaintiff as indorsee, against the defendant as drawer and indorser. The declaration alleged that the defendant drew the bill, bearing date the 11th October, 1834, on one W. B., who accepted the same, and the defendant indorsed the bill to one Mr. Newton, who indorsed it to one John Lewis, who indorsed it to the plaintiff.

Plea—That the indorsement by the defendant in the first count mentioned was an indorsement in blank, and that the defendant never delivered the said bill to the said Mr. Newton, but that he delivered it to one Lewis Levy, and the said Lewis Levy then received, and from thence until one Lawrence Levy, as hereinafter mentioned, first became possessed thereof, held the same for a specific purpose, for the sole use and benefit of the defendant, and

not otherwise, to wit, for the purpose and in order that he the said *Lewis Levy* might get the said bill discounted for the defendant; and of all which the said *Lawrence Levy* before and at the time when the said bill was delivered to him as hereafter mentioned, had notice; and the defendant further saith, that the said *Lewis Levy*, in violation of good faith, and contrary to the said purpose for which he received the said bill, afterwards, to wit, on the 12th October, in the year of our Lord 1834, delivered the same to the said *Lawrence Levy*, and the said *Lawrence Levy* took and received the same from the said *Lewis Levy* upon other and different terms, and without discounting the same for the defendant, and contrary to the said special purpose, and in breach and violation thereof, to wit, for the purpose and under colour and pretence of securing a debt then alleged to be due from the said *Lewis Levy* to the said *Lawrence Levy*; and the said Mr. *Newton*, and the said *John Lewis*, and the plaintiff, before and at the said time when the said bill was so indorsed to them respectively as aforesaid, and when they first respectively received the same, had notice of the premises aforesaid; and this the defendant is ready to verify, &c.

Replication.—And the said plaintiff, as to the plea of the said defendant by him above pleaded to the first count of the said declaration, says that the defendant broke his promise in that count mentioned, without such cause as is by him in his said plea to the said first count alleged; and this the said plaintiff prays may be inquired of by the country, &c.

General demurrer and joinder.—The point stated in the margin was, that the general denial and replication of *de injuriâ* in an action of *assumpsit* to a plea consisting of several matters and causes, and constituting one entire defence, is not admissible, and cannot be replied.

Crowder, in support of the demurrer, contended that

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the replication was clearly bad, as being inapplicable, and that it raised several issues, and was therefore bad for duplicity.

Bayley, in support of the replication; cited *O'Brien v. Saxon* (a), *Selby v. Bardons* (b), *Piggot v. Kemp* (c), and *Crisp v. Griffiths* (d), and contended that the replication properly put in issue all the facts stated in the plea, as all of them, except notice, were more in the knowledge of the defendant than of the plaintiff; but he objected that the plea was bad, as it was not averred that *Lewis Levy* had not received value for the bill.

Crowder was heard in support of the plea.

LORD ABINGER, C. B.—I am of opinion that the plea is bad. The defendant being a party to the bill ought to have shewn that he never received, either directly or indirectly, any consideration for the bill. All he alleges is, that *Lawrence Levy* took the bill without discounting it, but *Lewis Levy* may have received the money afterwards; nor does it shew that the defendant never received any value; and the Court cannot supply the want of those averments. I am also inclined to think that the replication is good, and that the objection made to it is matter of form. Formerly, under the general issue, most defences might be given in evidence; but, since the Court promulgated the general rule, for the purpose of simplifying trials at *Nisi Prius*, that all defences must be pleaded, the general issue now only puts in issue the making of the promise; and in actions on bills of exchange, there is strictly no general issue; but if the promise has been broken, the defendant must plead his defence specially. If the Court is right in

(a) 4 D. & R. 579; 2 B. & C. 908.

(b) 3 B. & Ad. 19.

(c) 1 Cr. & M. 197.

(d) Ante, Vol. 3, p. 752.

throwing the burden of proof on the defendant, the plaintiff, by his replication, certainly does so: he, in fact, says that he denies the cause, which the defendant alleges he had for breaking the promise laid in the declaration.

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BOLLAND, B.—I think the plea is bad. The Court is called upon to draw an inference from the facts stated, that there was no consideration, but the Court cannot do so.

ALDERSON, B.—I am of the same opinion. The plea is bad, because the defendant does not exclude by any averment the receipt of value. It also appears to me that the replication is good. The defendant says, that the plaintiff has no right to maintain his action, for the cause stated in the plea. The plaintiff, in reply, alleges that the cause stated in the plea is not true. Whether in point of form, this replication is right or not, is a different question.

GURNEY, B.—I am of the same opinion.

SCALES v. SARGESON.

MILLER shewed cause against a rule obtained by *Wightman*, calling upon *Saunders*, who made a claim to the defendant's goods when they were taken in execution, why he should not pay the sheriff his poundage, and the expense of keeping possession, and the costs occasioned to the sheriff by the claim so made, and which had been since abandoned. It appeared that the value of the goods was 26*l.*, and the expense of keeping possession for 154 days amounted to nearly that sum. He contended, that the claimant was not liable for the expense of keeping possession or for any of the other costs, and that the poundage ought to have been paid out of the goods.

Where a claimant, after an application under the Interpleader Act, abandons his claim after an issue directed; the sheriff is entitled to his costs from the time of directing the issue, and of the application of those costs.

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Wightman, in support of the rule, cited *Dabbs v. Humphries* (a), where a plaintiff, after an issue was directed, having abandoned all claim to the goods seized, was ordered to pay to the sheriff the costs of keeping possession subsequently to the sheriff's application to the Court, and also the expense of selling the goods and the costs of the rule.

PARKE, B.—I think the claimant is bound to pay all the costs incurred subsequently to the order of the Court, which directed the issue to be tried, but not the costs occasioned by the previous application of the sheriff, because he is looked upon as favoured by being allowed to make the application.

ALDERSON, B.—He ought also to pay the costs of this rule. If he had offered to pay those expenses to which he is liable, the costs of the rule would not have fallen on him.

Rule absolute accordingly (b).

(a) Ante, Vol. 3, p. 377. (b) See *Scales v. Sargeson*, ante, Vol. 3, p. 707.

JONES v. FOWLER.

CROWDER shewed cause against a rule obtained by *Chilton* for setting aside, with costs, the interlocutory judgment signed by the plaintiff in this action. It appeared, that, on the 27th May, the declaration was delivered with notice to plead in four days in the usual way; and there was a particular annexed to the declaration. The

A declaration in *assumpsit*, indorsed to plead in four days, being delivered, with particulars of demand annexed, the plaintiff, two days afterwards, finding that the particulars were wrongly entitled, delivered a fresh particular properly entitled; and, for want of a plea within the four days, signed judgment:—*Held*, that the judgment was regular, the accepting the amended particulars being a waiver of the objection to the first.

time to plead expired on the 1st of *June*. On the 30th *May* a new particular was delivered in consequence of a mistake having been discovered in the title of the former particulars, they having been intitled "in the *King's Bench*" instead of the "*Exchequer*." The defendant accepted the particulars; and, considering that the delivery of the new particulars was an extension of the time for pleading, and that he had the same time after the delivery of them, as he had at the time when the first particulars were delivered with the declaration, did not plead within the four days, nor obtain further time for pleading, whereupon the plaintiff on the 3rd of *June* signed judgment. It was now contended, in answer to the rule, that the delivery of particulars in the first instance with the declaration was not obligatory on the plaintiff, as it would only be a question of costs under the sixth rule of *T. T.*, 1 *Will.* 4(a); and that therefore, whether the particulars of demand were properly delivered or not in the first instance, the time for pleading ran on.

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Chilton, in support of the rule.—The fresh particulars being delivered on the 30th, with a notice that the particulars annexed thereto were delivered in lieu of the particulars annexed to the declaration, it must be considered that those particulars were intended to be delivered as annexed to the declaration in pursuance of the sixth rule, and with a view to save costs: if the delivery of those particulars at that time was good, for the purpose of saving costs, they must have necessarily drawn to them the declaration, and therefore it was the same as if the declaration had been delivered afresh with the particulars; for, if the declaration had been delivered in the first instance without particulars, and a summons for particulars had been taken out by the defendant, he would have had the same time after the delivery of the particulars as he would

(a) *Ante*, Vol. 1, p. 103.

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have had before the summons had been taken out, and the plaintiff would have had to pay the costs.

PARKE, B.—The new particulars were delivered in the place of the old ones, and the defendant, by accepting them, impliedly admitted them in the place of the old ones, and therefore both parties were left in the same situation as they were before; the defendant should have rejected the particulars. The rule can only be absolute on payment of costs.

ALDERSON, B.—I am of the same opinion.

Rule absolute on payment of costs.

KERRY v. REYNOLDS.

Where the issue was delivered with notice of trial indorsed for one day, and a separate notice for another, and the defendant, acting on the notice on the back of the issue, did not attend at the trial, on the day mentioned in the separate notice, the Court granted a new trial without costs.

A defendant appearing in person is bound by the same rules as he would have been if he had appeared by attorney.

MILLER shewed cause against a rule which had been obtained by *Wordsworth* for setting aside the verdict for the plaintiff in this action, and for a new trial. The issue was delivered to the defendant himself, with notice of trial for the sittings after *Easter* Term indorsed on it, and, at the same time, a separate notice of trial was given for the sittings in *Trinity* Term. It appeared that the cause was originally intended to have been tried at the sittings after *Easter* Term; but, in consequence of a negotiation, the plaintiff could not try till *Trinity* Term, and therefore gave notice for the sittings in that term, but by mistake continued the notice on the issue unaltered. The defendant swore that he sent to inquire whether the cause was set down for the sittings after *Easter* Term, and found that it was not. The cause was tried in *Trinity* Term as undefended.

PARKE, B.—The rule must be absolute, as the defendant

may have been misled by the two notices, which the Master says was irregular, but it must be without costs. The defendant, though he appears in person, must be liable in the same way as if he appeared by attorney.

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Rule absolute without costs.

WHEELER v. WHITMORE.

STEER moved for a new trial. The action had been tried in *Warwickshire* under the Writ of Trial Act. This was the fifth day after the return of the writ, the day before (being the last day for moving) the papers had been put into Mr. *Steer's* hands for the purpose of moving this rule; and the learned counsel was reading the papers when the Court unexpectedly rose at about three o'clock, being an hour earlier than was usual. It was submitted, therefore, under these circumstances, that counsel having been instructed before the four days had expired, and the Court having risen early, the motion might now be made.

A motion for a new trial must in all cases be made within the four days, even though the cause may have been tried before the sheriff in a distinct county. If the four days are insufficient, a special application must be made to the Court for further time.

Lord ABINGER, C. B.—The rule is, that a motion for a new trial must be made within the four days, and it is an inflexible rule from which we ought not to depart. It is no excuse that the attorney has not properly instructed counsel. If an application had been made yesterday the Court perhaps might have allowed further time, but the motion is now too late.

BOLLAND, ALDERSON, and GURNEY, Barons, concurred.

Rule refused.

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WOLSEY v. EDWARDS.

Where a cause was called on whilst the plaintiff's attorney's clerk was absent from the Court in consequence of an application made to amend, and the record was therefore withdrawn, but the cause was set down again immediately for trial, and afterwards the defendant obtained a rule nisi for judgment as in case of a nonsuit, whilst the cause was still in the paper, the Court discharged the rule with costs.

SWANN shewed cause against a rule obtained by *Comyn* for judgment as in case of a nonsuit for not proceeding to trial pursuant to a notice which had been given for the sittings in last term. It appeared, that, in the morning of the 27th of *April*, the plaintiff's attorney took out a summons to amend, which was heard before *Gurney, B.*, who dismissed it as being too late, the cause being then in the paper. The plaintiff's attorney then applied to the defendant's attorney to allow the amendment to be made on payment of costs. Whilst the negotiation was going on, the plaintiff's attorney's clerk left the Court to see his master upon the subject, but in the meantime the cause was called on, and the record was obliged to be withdrawn. On the same day the plaintiff's attorney gave notice to the defendant's attorney that it would not be necessary to apply to the Court for the costs of the day, as they would be paid without: 8*l.* were afterwards tendered on account of those costs. The cause was again set down for trial as soon as it could be, and notice of trial given, and the present motion was not made till after the cause was set down afresh. Under these circumstances it was contended, that this motion was unnecessary and vexatious, and that the rule ought to be discharged.

Comyn in support of the rule.—The motion is quite regular. The plaintiff has clearly made a default, and it is not a sufficient answer to this rule, that he has again put the cause down for trial, because he may again make a default. The object of the present motion is to insure a trial. The circumstances stated in answer to this rule are quite collateral to the ground of the present motion, which the defendant has a right to make where there has

been a default. The defendant was ready to try on the former service, and setting down the cause again does not bind the plaintiff to try.

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Lord ABINGER, C. B.—I think this motion ought not to have been made. It was unnecessary, and it appears to me to have been made against good faith, as the defendant's attorney knew that the plaintiff's attorney's clerk had left the Court about the amendment.

The other Barons concurred.

Rule discharged with costs.

NEWTON v. MATTHEWS.

THIS was an application to stay proceedings, on the ground that the action had been commenced without proper authority. The action was for not accounting for the sale of goods which had been consigned by the plaintiff to the defendant for sale, and also for goods sold and delivered. It appeared that the instructions to the attorney had been given by a person of the name of *Callington*, who managed the business for the plaintiff at the time the debt was contracted, and who still continued to manage it in the absence of the plaintiff, who was abroad. On the part of the defendant, it was sworn, that he was ready to pay the debt and account to the plaintiff, but that he had received a letter from the plaintiff, who was abroad, desiring him not to pay any money except by the plaintiff's written order, and that the defendant was willing to pay the money upon having an indemnity. In answer to the rule, it was sworn that *Callington* was authorized by the plaintiff to manage his business for him in his absence, and that he was in the habit of paying and receiving all debts.

Where a defendant was sued for the price of goods after he had received a letter from the plaintiff, who was abroad, not to pay except to his written order, the Court, on the application of the defendant, ordered proceedings to be stayed on the money being brought into Court, although the defendant had pleaded the facts by way of defence.

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John Jervis shewed cause, and contended that this application was too late. The writ of summons was issued in *April*, 1835, the declaration was delivered in *May*, the appearance having been entered by the defendant with full knowledge of the grounds of the motion, and that the defendant had since pleaded the facts specially. He urged that the money ought at all events to be paid into Court.

R. V. Richards, in support of the rule.—No authority has been shewn for bringing the action, and the defendant being willing to pay under an indemnity, the rule ought to be made absolute with costs.

PARKE, B.—It rather seems to me that *Callington*, being in the plaintiff's service at the time the debt was contracted, and being authorized to manage the plaintiff's business in the absence of the plaintiff while abroad, had an implied authority to instruct the attorney to commence the action: the letter received by the defendant directing him not to pay except to his written order, is matter of defence, and is pleaded. It may be referred to the Master to see if the letter is genuine, and whether *Callington* had authority to recover debts.

Ultimately it was ordered that proceedings should be stayed on the defendant's paying into Court 250*l.* on or before the last day of Term.

Rule absolute on these terms.

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LAKIN and Others v. MASSIE.

THE plaintiffs in this action sued as executors of *W. Watson*, deceased. The writ of summons was issued in *April*, 1833, at the suit of three of the plaintiffs, and on the 27th *March*, 1834, they declared against the defendant in *assumpsit* upon a promissory note for 150*l.*, and interest thereon, drawn by the defendant in favour of the testator, and dated *April* the 9th, 1827. On the 31st of *March*, the defendant pleaded in abatement the non-joinder of one *F. Watson*, who was co-executor with the plaintiffs, but who had never proved the will, and was a mere nominal party: in consequence of which, an application was made to the Court that the plaintiffs might be allowed to amend the writ and declaration, by adding the name of *F. Watson*, which the Court allowed, on the ground that, unless it was allowed, the Statute of Limitations would be a bar to the action (a). Upon that occasion, affidavits were made on behalf of the defendant, positively denying that there was any consideration for the note. The plaintiffs having afterwards made the amendment, and paid the costs, which amounted to 17*l.*, the defendant, on the 20th of *May*, 1834, pleaded the general issue, *non assumpsit*. In *April*, 1835, the plaintiffs having been ruled to reply, and having repeatedly obtained time for that purpose, ultimately took out a summons for discontinuing the action without payment of costs. That summons was opposed, and heard before *Gurney*, B., who made an order for that purpose on the terms prayed. A rule *nisi* having been obtained by *Whateley*, to set aside that order—

The decision of a Judge at chambers under the 3 & 4 *Will.* 4, c. 42, s. 31, as to executor's costs, is not final, but may be reviewed by the full Court.

Henderson shewed cause.—This action was commenced before the act of 3 & 4 *Will.* 4, c. 42, s. 31,

(a) See the case ante, Vol. 2, p. 633.

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came into operation (a); that circumstance, if it is not sufficient to prevent this case from being brought within the act, will induce the Court not to interfere to fix these plaintiffs with the costs, unless a clear case of vexation is made out against them, especially as it appears from the affidavits, that the estate is insolvent. It is expressly sworn by one of the plaintiffs, who has been the acting executor, that he found the promissory note uncanceled amongst the testator's papers, and without any thing to shew that it had either been paid, or was not an available security; that believing it to be so, he had put it in suit; and that it was only on account of the affidavit of a Mr. *Harper*, who was formerly the partner of the testator, and is now the attorney for the defendant, that there was no consideration for the note, that the plaintiffs, not being able to rebut the evidence which that gentleman would no doubt give upon the point at the trial, had determined to abandon the action. In the case of *Pickup v. Wharton* (b), it was considered by *Bayley, B.*, to be quite discretionary, whether, upon a discontinuance, an executor plaintiff should pay costs or not. He also cited a case which he said had been lately decided in the *King's Bench*, in which that Court held that the decision of a Judge, under sect. 31 of the 3 & 4 *Will. 4*, is final (c). Here an attempt has been made by the defendant, to shew that one of the plaintiffs knew that there was no consideration for the note; that, however, is positively denied, and therefore there is no reason why the Court should interfere.

Whateley, in support of the rule, contended, that it

(a) The act came into operation in *August*, 1833. This Court concurred with the decision of the K. B. in *Freeman v. Moyes*, 3 Nev. & Man. 883; 1 Ad. & Ell.

338, that the act applied to suits previously commenced.

(b) Ante, Vol. 2, p. 388.

(c) *Maddox v. Phillips*, K. B. Easter Term, 1835.

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was now incumbent on the plaintiff to shew some special ground why he should not pay costs like every other plaintiff. That was considered to be the effect of the new act in *Southgate v. Clarke* (a); there was nothing in this instance but the writ before the act passed, and therefore all the substantial costs have been subsequently incurred. It is positively sworn, that one of the plaintiffs, who is an attorney, knew of his own knowledge, that no consideration whatever was given for the note, he having been a clerk of the testator at the time of his death, and for some time previously; and that he was intimately acquainted with his affairs, and with the particulars of this transaction; and that before the amendment was made, he was told that the defendant had received no consideration, and that he would not pay. All that the plaintiff says in answer is, that he never knew what was the consideration. It was distinctly understood when the amendment was allowed, and upon its being urged that the defendant might be prejudiced as to the costs, that the question of costs should be considered in the same light as if the action had been then recommenced.

PARKE, B.—I think, under all the circumstances, the justice of the case is, that the rule should be absolute for setting aside the Judge's order, and that the action should be discontinued upon the plaintiffs undertaking to pay the costs incurred since the amendment. I cannot agree with the decision which is said to have taken place, that the Judge's order is final.

ALDERSON, B.—I am of the same opinion. I think that the Court has power to review the Judge's decision. The rule will be absolute without costs.

(a) 1 Scott, 374; 1 Bing. N. S. 518.

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BOLLAND and GURNEY, Bs., concurred.

Rule absolute for setting aside the Judge's order without costs; the plaintiff to discontinue, and pay the costs subsequent to the amendment.

VERRALL v. ROBINSON.

Property being attached in the hands of the defendant, under a foreign attachment against *A.*, in an action of trover by *B.*, the real owner, the refusal by the defendant, as garnishee, to deliver it up, is no proof of a conversion by him.

TO an action of trover to recover a chaise, the defendant pleaded—*first*, not guilty of the conversion; and, *secondly*, that the chaise was not the property of the plaintiff. Upon these pleas the plaintiff took issue. Upon the trial before *Parke*, B., it appeared that the plaintiff had let the chaise to one *Banks*, who had left it in the possession of the defendant, who was a livery-stable-keeper; and whilst it was so in his possession, it was attached by process out of the Sheriff's Court, for a debt of *Banks*. The chaise was demanded of the defendant, and he was informed that it was the property of the plaintiff, and not of *Banks*; but he refused to deliver it up on account of the attachment. Bail had not been put in. The jury found that the chaise was the property of the plaintiff, and the verdict on the second issue was for the defendant; but the learned Judge being of opinion that the refusal by the defendant under the above circumstances did not amount to a conversion, directed a verdict for the defendant on the first issue.

Humfrey now, by leave, moved that the verdict might be entered for the plaintiff on the first issue. The attachment was against the property of *Banks* in the hands of the defendant, and as it was found by the jury, that the property was in the plaintiff, the attachment was of no avail. Notice having been given to the defendant

that the chaise was the plaintiff's property, the defendant kept it afterwards at his peril. If the defendant had put in bail, as he ought to have done, the attachment would have fallen to the ground.

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LORD ABINGER, C. B.—Though the chaise was in fact in the possession of the defendant, yet it was really in the custody of the law: the defendant, therefore, was justified in not delivering it up, and, consequently, is not guilty of a conversion.

BOLLAND, B.—The only means of getting rid of the attachment was by putting in bail; and if he had delivered up the property, he would have made himself liable for the debt.

ALDERSON and GURNEY, Bs., concurred.

Rule refused.

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WORTHINGTON v. PRINCE.

THIS was a rule which had been obtained by *Butt*, on behalf of the plaintiff, calling on the defendant to shew cause why a rule should not be discharged, which had been previously obtained by him for setting aside a regular judgment signed by the plaintiff in this action (which was to recover two years' rent), for want of a plea. The latter rule had been obtained on an affidavit of merits, and on the terms of pleading issuably within two days, taking short notice of trial if necessary, and paying the costs. The present rule also prayed that the plaintiff might be at liberty to issue execution, on the ground that the de-

In an action for rent, for two years' use and occupation, judgment was signed for want of a plea, but was set aside on an affidavit of merits and pleading issuably, &c. The defendant pleaded, that the two years' rent became due under a lease, and after a fiat had issued against him,

and he had been declared a bankrupt; and that after the rent became due, he applied to the assignee to accept or decline the lease, and that the assignee declined the lease, and thereupon the defendant tendered the lease and possession to the landlord, who accepted the same. This plea was pleaded at the end of *Trinity Term*, too late to be argued in that Term. The Court discharged the rule for setting aside the judgment, as they considered the plea frivolous.

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defendant had pleaded an improper plea. The plea was as follows:—

And the defendant, by —, his attorney, as to the sum of 260*l.*, parcel of the said sum of 300*l.*, in the said declaration alleged to be due, for the use and occupation by the defendant of the said sets of chambers, rooms and apartments with the appurtenances of the plaintiff, saith, that the plaintiff ought not further to maintain his aforesaid action thereof against him, because he saith, that he became tenant to the plaintiff of the said sets of chambers, rooms and apartments with the appurtenances, and entered upon and held and used and occupied the same upon and by virtue of a certain agreement in writing, before the defendant became bankrupt, as hereinafter mentioned, to wit, on the fifteenth day of *March*, in the year of our Lord one thousand eight hundred and thirty-two, made between the plaintiff by *N. M.*, his agent in that behalf, and the defendant, and duly signed in that behalf by the said parties; whereby the plaintiff agreed to let, and the defendant agreed to take, the said sets of chambers &c., for five years, if *R. W.*, who is still living, should so long live, to commence from the twenty-fifth day of *March*, A.D. 1832, at the yearly rent of 130*l.*, payable quarterly on the twenty-fourth day of *June*, the twenty-ninth day of *September*, the twenty-fifth day of *December*, and the twenty-fifth day of *March*, in each year. And the defendant further saith, that before and at the time of the issuing of the fiat in bankruptcy herein-after mentioned, he was a trader, liable to become bankrupt, and subject to the bankrupt laws and statutes, then and now in force; and, whilst he was such trader, to wit, on the first day of *June*, in the year of our Lord one thousand eight hundred and thirty-three, became and was indebted to one *J. G.* in a sum exceeding one hundred pounds, to wit, one hundred and twenty pounds. And being such trader and so indebted, the defendant afterwards, and

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during the said term of five years, to wit, on the fifteenth day of *June*, 1832, became and was bankrupt, within the meaning of the said statutes, and afterwards and during the said term, to wit, on the same day and year aforesaid, a fiat in bankruptcy, grounded on the statute in that behalf, was, upon the petition of the said *John Green*, duly awarded and issued by and under the hand of *Henry Lord Brougham*, then being Lord High Chancellor of *Great Britain*, authorizing the said petitioner to prosecute his complaint in his Majesty's Court of Bankruptcy, as by the record of the said fiat, which was then duly filed of record in that behalf, duly appears; and such proceedings were thereupon had, that afterwards, to wit, on the same day and year aforesaid, *John Samuel Martin Fonblanque*, being one of the Commissioners of his Majesty's Court of Bankruptcy, duly found and declared that the defendant became a bankrupt, within the true intent and meaning of the statute in that case provided, before the date and suing forth of the said fiat, and did therefore declare and adjudge him bankrupt accordingly, as by the record thereof appears; and the said Commissioner afterwards, to wit, on the same day and year aforesaid, by instrument under his hand, appointed one of the official assignees of bankrupts, to wit, *George Gibson*, to be appointed assignee of the estate and effects of the said bankrupt, as by the record thereof remaining in the said Court of Bankruptcy appears; and such proceedings were had upon the said fiat, that afterwards, to wit, on the same day and year aforesaid, the said *John Green* was duly chosen and appointed, at a meeting duly held in that behalf, assignee of the estate and effects of the said bankrupt, by the major part of the creditors of the said bankrupt present at the said meeting, and who had proved debts to the amount of ten pounds and upwards, under the said fiat; and the said *John Green* then accepted the said appointment and trust, as by the memorandum of the said

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appointment and acceptance fully appears; and the defendant further saith, that afterwards, to wit, on the first day of *May*, in the year of our Lord one thousand eight hundred and thirty-five, upon application to the said *George Gibson* as such assignee, then duly made by the defendant, (the said *John Green* then being deceased), to accept or decline the said agreement or lease, and the said term and interest of the defendant of and in the said premises, the said *George Gibson* as such assignee, and then being sole assignee of the estate and effects of the defendant as such bankrupt, declined to accept the same, and the said assignees have not, nor hath either of them, ever accepted the said agreement or lease, or term or interest; and the said *George Gibson*, on the said application, refused to accept and declined the same; and therefore the defendant, by virtue of the statute in such case made and provided, afterwards, and within fourteen days then next following, to wit, on the same day and year last aforesaid, delivered up the said lease or agreement, and the said sets of chambers, rooms, and apartments, with the appurtenances, to the said plaintiff, and then quitted the said premises, and hath not at any time since held or used or engaged the same, or any part thereof; and the said plaintiff then accepted the said lease or agreement, and took possession of the said tenements; and the defendant avers, that the time during which the whole of the said sum of two hundred and sixty pounds in the said declaration is alleged to have accrued due, was after the date and issuing forth of the said fiat or commission as aforesaid; and this the defendant is ready to verify: wherefore he prays judgment, if the plaintiff ought further to maintain his aforesaid action thereof against him, &c. And as to the residue of the said monies in the said declaration mentioned, the defendant saith, that he never was indebted as therein in that behalf alleged, and of this the defendant puts himself upon the country, &c.

It was contended on the part of the plaintiff, that this was not such a plea as was contemplated by the rule. On the other hand it was contended, that the tenant could not give up possession without the consent of the assignee; and it was alleged that the plea was pleaded under advice of counsel.

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LORD ABINGER, C. B.—It is consistent with this plea, that the assignees may have declined a month after the bankruptcy. The declining in the act means after demand by the lessor. It seems to me, that the plea, to be good, should have had an averment, that the assignee at no time before agreed to give up the lease.

PARKE, B.—The declining of the assignee must be such as to preclude him from taking possession, consistently with this plea. The defendant may have gone to the assignee and said, will you give up the lease, and I shall thereby get rid of two years' rent. The plea is clearly bad; it should have shewn the privity of the plaintiff. The only effect of the plea would be to compel the plaintiff to demur, and throw him over the long vacation; if such a plea was intended to have been pleaded, it ought to have been pleaded within the time for pleading, or of the additional time allowed by the judge's order. It is an attempt to get rid of two years' rent after two years' occupation.

The other Barons concurred.

Rule absolute.

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SOLLY and Others v. NEISH.

Reported also 2 C.M. & F. 655, 5 Tyr. 625.

To a declaration in assumpsit for money had and received, plea, that the money so received by the defendant was the produce of goods consigned to and deposited with the defendant by P. & C. as their own goods, with the knowledge of the plaintiff, but which were in fact the goods of the plaintiffs and P. & C. jointly, for the purpose of securing advances by the defendant to P. & C., and with a power of sale to reimburse him for such advances; and that the goods were sold by the defendant to cover advances made to P. & C. in ignorance that the plaintiffs were interested in the goods, and the defendant offered to set off the amount of those advances against the proceeds of the goods. The plaintiffs replied that the defendant broke his

ASSUMPSIT.—The declaration stated that the defendant, on the 1st October, 1834, was indebted to the plaintiffs in 5000*l.* for money before then received by the defendant for the use of plaintiffs; that the defendant afterwards, to wit, on the day and year aforesaid, in consideration of the premises, then promised to pay the said sum of money to plaintiffs on request: to the plaintiffs' damage of 5000*l.*

Plea.—As to so much of the said declaration as relates to the sum of 5000*l.* therein stated to have been received by the defendant for the use of the plaintiffs, the defendant says that plaintiffs ought not to maintain their aforesaid action against him, because he says that the said money so received by the defendant was the amount of the proceeds of sale by the defendant of divers goods and chattels, to wit, two hundred tons of flax, consigned to and deposited with the defendant by certain persons trading under the style and firm of *Petrie & Chapman*, as and for their own goods and chattels, with the knowledge and assent of plaintiffs, but which in fact were the goods and chattels of the said *Petrie & Chapman* and plaintiffs jointly, upon the terms and conditions of said goods and chattels being a security for any money the defendant might advance to Messrs. *Petrie & Chapman*, with power of sale to reimburse himself for any such advances; and that the defendant, believing the said goods and chattels to belong to *Petrie & Chapman*, and not knowing that plaintiffs were interested therein, did, after said consignment and deposit, and before the sale of said promise of his own wrong, and without the cause mentioned in the plea, and then new assigned that the action was brought for the proceeds of certain other goods which the defendant had promised to pay to the plaintiffs. Upon demurrer to the replication and new assignment for duplicity:—*Held*, that the plea was bad, amounting to the general issue, and that the replication of *de injuria* was bad in itself, as not being applicable to the plea, nor allowable if the right to reply *de injuria* in *assumpsit* is to be governed by the same rules as obtain in trespass. *Semble*, that the new assignment might be supported.

goods, and before he knew that plaintiffs had any interest in the same, make divers advances of money to *Petrie & Chapman* to a large amount, to wit, to the amount of 6000*l.*, on the credit and security of said goods and chattels; and the same remaining unpaid, he did afterwards, and before the commencement of this suit, to wit, on the 1st *October*, in the year aforesaid, sell the said goods and chattels, and received said money in said declaration and commencement of this plea mentioned, being the proceeds thereof. And he further says, that he is ready and willing and hereby offers to set off and allow to plaintiffs the amount of the said advances which still remain due, owing, and unpaid to defendant, and greatly exceed the money in the said declaration and commencement of this plea mentioned, against the amount of the damages sought to be recovered by the plaintiffs in respect of the said sum of money in said declaration first mentioned; and this he is ready to verify, &c.

Replication.—The said plaintiffs as to said plea of said defendant by him lastly above pleaded to said sum of 5000*l.* therein mentioned, say that they, by reason of anything therein alleged, ought not to be barred from maintaining their said action as to the last-mentioned sum of money, because they say that he, the said defendant, of his own wrong, and without the cause by him in that plea alleged, broke his promise and undertaking as to the last-mentioned sum of money, in manner and form as the said plaintiffs have in their said declaration in that behalf complained against him; and of this they, the said plaintiffs, put themselves upon the country, &c.

New assignment.—And the said plaintiffs further say, that they brought their said suit against the defendant not only for the recovery of the money, the proceeds of the sales of the goods and chattels in the introductory part of said plea mentioned, but also for that said defendant, on the day and year aforesaid, was indebted to plain-

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tiffs in 5000*l.* for money before then received by said defendant to the use of the plaintiffs, and being the proceeds of certain sales before then made and effected by said defendant of divers, to wit, two hundred tons of flax, the respective cargoes of certain vessels called the *Orb* and *Eliza* respectively, and which said flax, before the sales thereof so made by said defendant, to wit, on the 6th *December*, 1833, the said defendant, by a certain letter addressed by him to the said plaintiffs declared to be under his, said defendant's care, on the account of said plaintiffs, and that he, the said defendant, should hold the same, according to any instructions the said plaintiffs might be pleased to give the said defendant for the sale thereof; and being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the day and year in that behalf aforesaid, promised to pay the last-mentioned sum of money to the plaintiffs in manner and form as the plaintiffs in their said declaration have complained against him, and which said last-mentioned sum of money so had and received by the defendant for the said plaintiffs' use, and above newly assigned, is other and different money, and the proceeds of other and different sales than those in the said plea of the said defendant mentioned; and this they, the said plaintiffs, are ready to verify, &c.

Demurrer.—That the said replication and new assignment of the said plaintiffs to the said plea of the said defendant by him lastly above pleaded to the said sum of 5,000*l.* are not sufficient in law, for that the said replication and new assignment are double, and contain several and distinct answers to the said plea of the said defendant, and the said replication does not traverse or deny any distinct fact or facts, but puts the whole of the allegations in the plea in issue, and also in the new assignment alleges matter in avoidance of the said plea, and so proposes a double answer thereto. Also for that

the said plaintiffs have not expressly or distinctly traversed and denied, or confessed and avoided any of the allegations in the said plea; and for that the said replication and new assignment are double, multifarious, uncertain, informal, and insufficient.

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Wightman, in support of the demurrer.—The plea covers every thing in the declaration, it puts in issue every allegation; and, therefore, unless it is entirely established by evidence, the plaintiff would be entitled to recover; if the plaintiff can shew that any part of the 5000*l.*, mentioned in the declaration was received otherwise than stated in the plea, he negatives the plea, and is entitled to a verdict. The plaintiff, therefore, ought not to have replied, and new assigned also. He has no right to deny every fact in the plea, and also to reply something else. [*Parke, B.*—Your argument supposes that, upon this plea, the defendant must prove that the whole of the money was received by the defendant under the circumstances stated in the plea; and that if the plaintiff proved that any part of the money, however small, was not so received, the plea is negatived. The question is, whether that is the necessary consequence of *de injuriâ*. May not the plea be considered as if it concluded with a *quæ est eadem?*] If the plaintiff had taken issue upon the agreement stated in the plea, it would have been different, but if he proves any money to have been received, other than is mentioned in the plea, he entitles himself to a verdict.

Maule, in support of the replication.—*De injuriâ*, in actions on contracts, is only not usual, because special pleas are unusual; yet this replication was adopted in *Richards v. Murdock* (a), and no objection was taken;

(a) 10 B. & C. 527.

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but it is objected, that the replication and new assignment together are double; that objection, however, does not apply here, because the sums are indefinite, and neither party is bound to the exact sum specified. The distinction is, where the matter complained of in the declaration is single, as one assault, the plaintiff cannot reply, by denying the defendant's justification, and also new assign; but if the charge is, that the defendant assaulted the plaintiff on divers days and times, and the plea justifies one assault on a particular day, the plaintiff may take issue upon it, and also new assign that he brought his action for a number of other assaults. The rule applies to sums, as well as to times. *De injuriâ* means, not that all the facts in the plea are false, but that some are not true. Suppose there were two parcels of goods, and that such agreement did take place as is mentioned in the new assignment, the plaintiff would not be able to recover the second under *de injuriâ* only: there is nothing in the plea to shew that it was intended to apply to all the plaintiffs' claims. It cannot be collected from the pleadings, as the declaration is in general terms, whether the plaintiffs go for more than what the defendant alludes to in his plea: the plaintiffs, therefore, by the new assignment point out more particularly what they do go for. [*Parke, B.*—If there were really any other goods than those mentioned in the plea, the question is, whether that fact is not put in issue. If this had been trespass, such a fact would not have been in issue; but this is more like the plea of leave and licence, and then the replication of *de injuriâ*; there, if the plaintiff proves any one trespass, which the defendant's plea does not apply to, the plaintiff recovers; that is from the form of the plea; but if the plea had stated specially, that, on certain days, the plaintiff gave me licence to do the acts complained of, and that I did them by virtue of that licence, then the plaintiff must new assign. There is a distinction between

the pleas. I was in the habit of adopting the latter mode at the bar, on the supposition that the plaintiff would be driven to a new assignment. The question is, whether this plea applies to no other goods than those mentioned in it.] The defendant does not say that he broke the promise stated in the declaration, but he pleads only to certain of the goods to the value of 5000*l*.

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Wightman, in reply.—*Barnes v. Hunt* (a) applies to the present case. *De injuriâ* puts in issue every material allegation in the plea. If the allegation, that the money received was the produce of the particular goods stated in the plea, is a material averment, it is put in issue by *de injuriâ*, and the replication is therefore double.

Cur. adv. vult.

LORD ABINGER, C. B., delivered the judgment of the Court. (After stating the pleadings, with the causes of demurrer, his lordship proceeded)—The principal question raised in argument was, whether the plaintiff could, having this general replication, also newly assign; the objection to the form of the replication was not much relied on.

The plea is clearly bad (b). It denies, first, the plaintiff's sole right to recover; it amounts then to a traverse of the promise to the plaintiff, and is in fact the general issue. It goes on afterwards to allege, that the defendant retained, in pursuance of the plaintiff's licence and authority, the money sought to be recovered, as a means of paying his advances—advances not made to the plaintiff, but to *Petrie & Chapman*. The mode of stating this, again, is in fact the general issue; because it amounts to a denial that the proceeds were money had and re-

(a) 11 East, 4.

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(b) Query, on special demurrer?

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ceived to the use of the plaintiff. Supposing that to be otherwise, and that the latter part of the plea is to be considered a plea of set-off, it would be bad on special demurrer, both as amounting to the general issue and for duplicity.

The replication appears to be bad for two reasons: *first*, the plea does not contain matter of excuse, but a denial of the promise; and it cannot put the matter in the plea in issue, for it denies only the cause of the breach of promise. The plea, however, does not admit and excuse a breach of promise, but it denies that any promise at all was made to the plaintiff. The replication, therefore, does not traverse the facts stated in the plea, nor does it confess and avoid them. And, *secondly*, it would be bad if the principles of pleading in trespass, as contained in *Crogate's case* (a) and other authorities, are applied to an action of *assumpsit*; for the defendant claims an interest in the money, and he claims a right to retain it by and in consequence of an authority given by the plaintiff; in either of which cases the general replication is not allowed. There is no occasion to enter into the question, whether or not the new assignment is bad. Supposing the first part of the replication to be good, the inclination of the opinion of the Court is, that the new assignment might be supported. The judgment of the Court will be for the defendant, both parties having leave to amend on payment of costs.

Judgment for the defendant, with leave to amend.

(a) 8 Co. 66.

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BURLEY v. STEVENS.

ALEXANDER applied to the Court for a rule to shew cause why both the parties to this action should not consent to enlarge the time for making an award. The action was brought to recover the amount of a blacksmith's bill, comprising 600 items. The last meeting before the arbitrator was on the 4th day of *Easter Term* last, at *Gloucester*. The arbitrator then mentioned, that he should require another meeting on the 29th *June* following, and neither party objected; but by accident the arbitrator had allowed the time for making his award to pass without enlarging it. In support of this motion, he cited *Taylor v. Gregory (a)*, where a verdict was taken for 3000*l.*, subject to an award, to be made by a certain day, as to the amount of damages. The arbitrator accidentally let the day pass without making his award, and the defendant's attorney would not consent to the time being enlarged. The Court granted liberty to the plaintiff to enter up judgment, and issue execution forthwith for the whole amount of the verdict, unless the enlargement were consented to. In *Woolley v. Kelly (b)*, the same principle was recognised. There, in an action against several defendants, a verdict was taken for the plaintiff for 400*l.* damages, subject to a point of law, reserved for the opinion of the Court, and in case that point should be determined in favour of the plaintiff, then subject to the award of a barrister as to the damages. The point of law having been decided in favour of the plaintiff, the arbitrator having been consulted by one of the parties in the cause, declined proceeding in the reference. One of the defendants refused to name any other arbitrator. Under the circumstances, the Court ordered judgment and execution

Where a cause was referred to an arbitrator, who, at a meeting, at which the plaintiff and defendant were present, appointed a future day for another meeting, but which day was beyond the time allowed for making the award, and the arbitrator by accident omitted to enlarge the time for that purpose, the Court refused to interfere by making a rule to extend the time for making the award to the day named.

(a) 2 B. & Adol. 774.

(b) 1 B. & C. 68; 2 D. & R. 158.

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to issue against that defendant for the damages found by the jury, unless he would consent to refer the damages to some other arbitrator. In *Hall v. Phillips (a)*, where the Court of *Common Pleas* refused to interfere, and allowed judgment to be entered up for the plaintiff, the time for making the award having expired, and the defendant having refused to proceed with the arbitration, the previous case of *Taylor v. Gregory* was not cited. In the present case, it was fully understood at the last meeting that the next meeting would take place on the 29th *June*; and as the defendant then made no objection, there was no reason why the Court should not enlarge the time till that day, otherwise all the expense already incurred might be thrown away.

PARKE, B.—When this case was before me at chambers, it appeared to me that the Court had no power to grant this motion. This is an agreement by parol to extend the time for making the award. If a consent has been given to the further extension of the time, the arbitrator can act upon it, but I think the Court cannot grant the rule.

Lord ABINGER, C. B., BOLLAND and ALDERSON, Bs., concurred.

Rule refused (b).

(a) 2 M. & Scott, 167; 9 Bing. 89.

(b) See *Wilkinson v. Time*, ante, p. 37.

HANNINGTON v. BEARE and Another.

Bail are discharged, by time being given to their principal without their consent, although they may not have been damnedified.

HUMFREY shewed cause against a rule which had been obtained by *Espinasse*, on behalf of the bail in this action, calling upon the plaintiff to shew cause why an *exoneretur* should not be entered on the bail-piece, on the ground of time having been given to the defendant in the

original action without the knowledge of the bail. From the affidavits, it appeared that notice of trial in the original action was given on the 20th of *February* last, for the next Assizes for *Sussex*; that the commission day was on *Monday*, the 23rd *March*; and that on that day the defendant executed a cognovit, whereby he confessed the action, and that the plaintiff had sustained damages to the amount of one shilling, besides his costs and charges; and it was stipulated that no judgment should be entered up or execution issue, but in default of payment of 11*l.* 7*s.* 5*d.*, being the debt agreed to be taken in the said action, together with the costs, to be taxed, if necessary, as between attorney and client, in manner following: 15*l.* on the date thereof, the further sum of 5*l.* on the 31st day of the said month of *March*, and the balance of the said debt and costs on the 1st day of *May* then next, until the whole of the sum of 11*l.* 7*s.* 5*d.*, together with costs as aforesaid, should be fully paid and discharged; but in case default was made in payment of the said sum of 11*l.* 7*s.* 5*d.* and costs, as aforesaid, or any part thereof, in manner and at the time aforesaid, judgment might be entered up thereon, and execution issue for the said sum of 11*l.* 7*s.* 5*d.* and costs, or so much thereof as should be then unpaid. The defendant having made default, judgment was entered up on the 3rd of *April*. The present action was commenced against the bail on the 1st of *June*, for the sum of 43*l.* 3*s.* 5*d.*; and it was sworn that the cognovit was given without the knowledge or consent, either directly or indirectly, of the defendants. It was now contended, that, under the circumstances, the bail were not discharged; because it did not appear that they had been at all prejudiced, or that more time had been allowed than the bail would have had, if the plaintiff had gone to trial; that, as the commission day at *Lewes* was on the 23rd, the cause would probably not have been tried for two

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or three days; and that if the Judge had granted the plaintiff speedy execution, he would have allowed the defendant ten days or a fortnight's time to have paid the money; but if the Judge had not thought proper to grant speedy execution, the plaintiff could not have got judgment till after the first four days of the following term, which began on the 15th of *April*; and therefore, as judgment was signed on the 3rd of *April*, it was in either case signed before the plaintiff would have got judgment in the usual course; that it was not sufficient to shew that more time had been agreed to be given, unless it was actually given, and that here, though the time for payment of the last instalment would not have arrived till the 1st of *May*, if the defendant had performed the agreement, yet, as it was a condition precedent, that the defendant should pay part of the debt on a previous day, which he neglected to do, the agreement was at an end, and the plaintiff was just as much at liberty to sign judgment, as he would have been, if the action had gone on in the usual course. The bail, therefore, had not been damnified.

Lord ABINGER, C. B.—The question is not, whether the bail have been damnified; the rule is, that if time be given to the principal, without the consent of the bail, they are thereby discharged. I am of opinion that this rule ought to be made absolute.

BOLLAND, B., and ALDERSON, B., were of the same opinion.

Rule absolute, with costs.

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SCOTT and Others, Assignees &c., v. LEWIS, Esq., Under-sheriff of CARMARTHENSHIRE.

CHILTON applied on behalf of the defendant in this action for a rule under the Interpleader Act, 1 & 2 Will. 4, c. 58, and for staying proceedings. The circumstances were these:—A *fi. fa.* was delivered to the sheriff to levy on the goods of *John Jones* 2000*l.*, which had been recovered against him by *Rees Jones*, and on the 1st of *February*, 1834, a levy was made, and a sale of the defendant's goods took place; and it was conducted with publicity, and the proceeds, when received by the under-sheriff, were handed over by him to the execution creditor. No notice had been given of the defendant having become bankrupt, and collusion was denied; but the affidavit did not state when the fiat issued, or the date of the act of bankruptcy. The present action had been commenced by the plaintiffs, as assignees of *John Jones*, to recover from the sheriff the money which had been so paid over; and it was contended, that the sheriff having no interest in the subject-matter of the action, and having paid over the money innocently, it was a case within the provision of the act. He referred to *Anderson v. Calloway* (a), where it was held that the sheriff was not entitled to relief under the Interpleader Act, where he had paid over the levy-money to the execution-creditor after notice of a claim had been given. The language of the Court in that case is sufficiently general to apply to any case where the sheriff has paid over the money: but if that was the opinion of the Court, it was extra-judicial, because in that case notice of a claim was made, and in the present case there was no notice. In that case it was held, that the 1st and 6th clauses of the act are to be construed to-

Where a sheriff, after levying the amount of an execution on the defendant's goods, paid over the proceeds to the execution-creditor, not having received any notice of a claim from any one, and afterwards an action was brought against the sheriff by the defendant's assignees to recover the value of the goods:—*Held*, that the sheriff was not entitled to relief under the Interpleader Act.

(a) Ante, Vol. 1, p. 606.

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gether; but it has since been determined in *Donniger v. Hinzman* (a), and *Dobbins v. Greene* (b), that though, on an application under the 1st section, the affidavit must negative collusion, yet that it is not necessary that the sheriff should do so. *Anderson v. Calloway* is therefore no authority against the present motion (c); and the words of the 6th section are sufficient to comprehend this case, for it specifies "claims to the *proceeds* or value of goods" taken in execution, as well as to the goods themselves; and the Court is authorized in its discretion to exercise all or any of the powers mentioned in the 1st section. The sheriff is just as much in need of protection where he has *bond fide* paid over the proceeds of a levy, and the claimant has neglected to give him notice, as where he has the proceeds still in his hands, in consequence of a notice that they are claimed by a third person: in either case he is within the mischief intended to be remedied by the act as it is stated in the preamble to the 6th section, *viz.* "his being exposed to the hazard and expense of an action by reason of a claim made by the assignees to the goods taken in execution;" and in neither case has he any interest in the subject-matter of the suit. That part of the 1st section which requires that the applicant should be ready to bring into Court the subject-matter of the suit, must be considered to be applicable only to a case, where the sheriff has the goods still in his hands; and ought not to be insisted on where, in consequence of the claimant's own neglect to give notice to the sheriff, the proceeds of the execution have in due course been paid over to the execution-creditor.

(a) Ante, Vol. 2, p. 424.

(b) Ante, Vol. 2, p. 509.

(c) From the report ante, p. 637, it appears that the sheriff thought it worth while to bring the amount of the levies into

Court (though he had paid over the money), in order to protect himself from actions, and that, on his doing so, the rule was made absolute.

LORD ABINGER, C. B.—I am very much disposed to relieve the sheriff, but I think the present case is not within the act. The affidavit ought to have shewn when the fiat issued.

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PARKE, B.—I think the affidavit has omitted to state most important facts.

BOLLAND, B.—The sheriff having done his duty, and completely executed the process, I think the act does not apply.

GURNEY, B.—I think this case is not within the act.

Rule refused.

SWAIN and Others, Assignees, v. LEWIS.

THIS was an action by the plaintiffs, as assignees of a bankrupt, upon a bill of exchange indorsed by the defendant to the bankrupt, and for goods sold. The cause was tried before the under-sheriff; and in order to prove notice of dishonour a witness was called to prove the contents of a letter by which notice was given, and which had been put into the post. It was objected at the trial, that there should have been a notice given to produce the letter or else a duplicate of the original proved. The objection was overruled, and the plaintiffs obtained a verdict. *Mansel* moved for a new trial or that a nonsuit might be entered, on several grounds; but the Court granted a rule *nisi* only upon the question whether sufficient proof of notice of dishonour had been given to entitle the plaintiffs to give parol evidence of the contents of the letter.

Notice to produce a notice is unnecessary.

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LEWIS.

Humfrey shewed cause.—He contended that it was now an established practice to admit proof of a notice without any notice having been given to produce the original, and he relied upon *Kine v. Beaumont* (a), where it was held, that the copy of an original letter giving notice of the dishonour of a bill is admissible in evidence without notice to produce the original letter; and there is no substantial distinction between proving such notice by producing a duplicate and giving parol evidence of the contents where no copy of the letter has been kept.

Mansel was heard in support of the rule.

PARKE, B.—There are two *Nisi Prius* cases one way (b), and two the other way (c).

LORD ABINGER, C. B.—Since the case of *Solarte v. Palmer* (d), and *Hartley's case* (e), the form of the notice of dishonour has become very material; and the question is important whether secondary evidence should have been admitted without notice to produce the letter.

Cur. adv. vult.

LORD ABINGER, C. B., now delivered the judgment of the Court.—This case was argued last *Easter Term* upon the question, whether, in an action on a bill of exchange against the indorser, where notice of the dishonour was given by letter, notice to produce that letter was ne-

(a) 7 Moore, 112; 3 Brod. & Esp. 455; *Surtees v. Hubbard*, 4 B. 288, S. C. Esp. 203; *Phillipson v. Chase*, 2

(b) See *Acland v. Pearce*, 2 Campb. 110; 1 Bing. N. S. 194; 1 Scott, 1.

(d) 5 M. & P. 475; 7 Bing. Stark. 174; *Show v. Markham*, 530; 1 Tyr. 371; 1 Cr. & J. 417.

(e) 6 D. & R. 505; 4 B. & C. Esp. 156.

(c) See *Gottlieb v. Danvers*, 1 339; 1 C. & P. 555.

cessary before parol evidence could be given of its contents; or whether the usual rule, that it is unnecessary to give a notice to produce a notice, applied to this case. We have conferred with the Judges of the *Common Pleas* on the point, and we all agree that it was unnecessary in this case that notice should have been given to produce the letter containing the notice of dishonour. It will, therefore, be understood to be the rule, that it is unnecessary to give notice to produce a notice of dishonour of a bill of exchange. The rule will therefore be discharged.

Rule discharged.

SIMONS v. BLAKE.

THIS was an action for slander, imputing to the plaintiff that he was guilty of felony. The cause was tried, and the plaintiff obtained a verdict. Shortly afterwards the plaintiff was tried and convicted of felony, and upon that trial the defendant was a witness against the plaintiff. A rule *nisi* for staying all further proceedings was obtained on behalf of the defendant, and the Court directed that the rule should be served on the Attorney-General; but the Crown declined to interfere. The case was afterwards fully argued by *Bompas*, Serjt., and *Manning*, on the part of the plaintiff's attorney, and by *Erle* and *Rowe*, in support of the rule. The nature of the case will appear fully from the judgment of the Court, which was delivered this Term, by

BOLLAND, B.—This was an application to stay proceed-

imputing felony, was convicted and attainted of felony, and the defendant in the action was a witness against him, the Court refused to interfere, by staying all further proceedings in the action, though the Crown declined to interfere.

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The lien of an attorney is only co-extensive with the rights of his client, and therefore as between the plaintiff and defendant the lien of the plaintiff's attorney cannot affect the right of the defendant.

The Court will relieve on motion, instead of putting a party to his *audita querela*, where the case is clear, but not otherwise; and therefore, where a plaintiff, after he recovered damages in an action of slander for words

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ings in an action of slander. The declaration alleged that the defendant had spoken words of the plaintiff, imputing to him the commission of a felony. The defendant pleaded the general issue only. At the trial before my brother *Patteson*, the plaintiff had a verdict. Subsequently to this the plaintiff has been tried and attainted of felony on a charge made against him by the defendant; and on the trial the defendant was examined as one of the witnesses for the prosecution. Upon these facts, disclosed on affidavits, the defendant applied for the present rule, and the Court directed that it should be served on the Attorney-General; it now appears that the Crown declines to interfere on either side, and the question is, whether the attorney on the part of the plaintiff, and on behalf of whom cause was shewn, is to be deprived of the fruits of his verdict by the present rule being made absolute. We think that he is in no better situation than his client ought to be; the lien of the attorney depends upon the right of the client to judgment. Where the client is entitled as against a party, the Court permits the attorney, in some cases, to carry on a suit for his own benefit, even where the client declines to do so himself; but where there is no collusion, and the client, either by his own act or that of the law, is deprived of the means of further enforcing his claim against the opposite party, the lien of the attorney is precluded altogether. If, therefore, we were clearly satisfied that the plaintiff in this case was in that situation, it might be proper to grant the present application.

Now, it is said, that the defendant has a right to his writ of *audita querela*, and thereby to deprive the plaintiff of the power of taking out execution after judgment, when signed; and there is no doubt that the Courts have laid it down, that where the defendant is entitled to such redress by writ of *audita querela*, they will give relief by a motion, in order to prevent the necessity of such a writ.

But it is a rule, that the case for relief must be clear, for the Court, by permitting such a summary remedy, conclusively determines the facts; and, even if they are properly investigated, the defendant is precluded from the benefit of the judgment of a court of error upon any question of law arising therefrom. It is upon this ground, therefore, we think the Court ought not to grant this application. In the first place it may be questionable, how far by any act on the part of the Crown the defendant will be enabled effectually to obtain relief by the writ of *audita querela*; in the next place there are nice questions relating to the law of forfeiture, ingeniously put by the counsel Mr. Manning, who shewed cause; and, lastly, though this Court entertains no doubt that (though a party) the defendant may prove the fact on which the attainder proceeded, and that the record of the conviction would be admissible evidence on a writ of *audita querela*, yet we do not think it right, on an application for the extraordinary interference of the Court, to grant a summary conclusive relief, and lend our assistance, to a party who has been, to a certain extent, a witness in his own cause. Upon the whole, we think the rule must be discharged, and the defendant left to his remedy by writ of *audita querela*.

Rule discharged.

DOE d. SMITH v. ROE.

MELLOR moved for judgment against the casual ejector, upon an affidavit of service upon the tenant's daughter, on the day before Term, May 26th; and that the tenant on the 27th, first day of Term, acknowledged the receipt of the declaration.

ALDERSON, B.—Take a rule.

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SIMONS
v.
BLAKE.

Service of the declaration in ejectment upon the tenant's daughter before the Term, and an acknowledgment by the tenant within the Term:—
Held sufficient to ground a motion for judgment against the casual ejector.

1835.

Twigg v. Potts and two Others.

Where a Judge certified at the trial of an action of trespass, to deprive the plaintiff of costs, the Court held the Judge's opinion final.

Where to trespass for seizing goods, the defendant pleaded two pleas, one justifying upon a distress for rent due under a demise at 5*l.* a year, and another for 2*l.* 10*s.*, and both issues were found for him :—*Held*, that they were not inconsistent.

The rule for taxing to the defendants the costs of the two issues found for them was drawn up with this additional clause, "and that the costs, when so taxed, be paid by the said plaintiff to the said defendants:"—*Held*, that the Court had no power to make such an order, and they directed the record to be amended by an entry of a judgment for the costs of those two issues, upon which the defendants might proceed to obtain their costs, if they thought proper.

WHATELEY showed cause against a rule which had been obtained by *R. V. Richards*, calling on the plaintiff to show cause why the Master should not tax to the defendants the costs of two issues found for them at the trial of this cause. He also appeared in support of a cross rule obtained by the plaintiff, that the officer might attend the Judge with the *Nisi Prius* record, for the purpose of having the Judge's certificate struck out.

The action was in trespass for seizing and taking the goods and chattels of the plaintiff. The pleas were, *first*, the general issue; *secondly*, a justification under a distress for 65*l.* rent due to the defendant *Potts* as landlord, at 5*l.* per annum; *thirdly*, a similar plea for rent due for the same premises, stating the rent to be 2*l.* 10*s.* per annum. To which the plaintiff replied, that he did not hold *modo et forma*; and at the trial at the *Spring Assizes* for *Staffordshire*, 1834, *Park, J.*, recommended the plaintiff to withdraw a juror; which he declined. The jury found for the plaintiff on the first issue, with one farthing damages, and for the defendants on the other two issues. The Judge said he would certify to deprive the plaintiff of costs, which would have the same effect as withdrawing a juror. He afterwards certified accordingly. A rule for a new trial was moved for by the plaintiff, and ultimately discharged on the 7th of last *June*. On the 18th of *November*, an application was made to *Park, J.*, by the defendants, to be allowed to enter the verdict for the defendant on the last plea only; but the Judge thought it was too late (a). The Master, on the taxation of costs, declined

(a) Final judgment was entered on the judgment-roll in this form : "And because it appears to the Barons here that the damages re-

covered do not amount to forty shillings, but to one farthing, and no more, and that it is so signified and set down by the said Jus-

to tax to the defendants the costs of the two issues found for them, because it was said he considered them contradictory, one being for 5*l.*, and the other for 2*l.* 10*s.* This motion was made on rule 74 of *H. T. 2 Will. 4*, which directs that all issues found for the defendant shall be deducted from the plaintiff's costs. It was contended, that this rule was not compulsory, and that it was a case in which the Court ought not to interfere. Before that rule it was held, in *Butcher v. Green* (a), that where there are issues joined on several counts, and upon some a verdict is found for the plaintiff, and upon others for the defendant, the defendant was not entitled to costs on that part of the record on which the verdict was found for him. At all events, the application is too late, and the pleas are contradictory. Judgment ought to have been entered for the plaintiff on one of them. It would be error on the record if both of them were to stand. [*Alderson, B.*—The pleas are not necessarily inconsistent, because there may have been two rents issuing out of the same premises.] The 43rd *Eliz.*, c. 6, enables the Judge to certify and deprive the plaintiff of costs in any personal action where the freehold is not in question, and the damages to be recovered do not amount to 40*s.* It has been held, that the certificate under that act need not be granted at the time of trial. *Foxhall v. Bankes* (b). That case shews

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tices, before whom the said action was tried, according to the form of the statute in such case made and provided. Therefore it is considered that the plaintiff do recover against the defendant his damages, costs, and charges, by the jurors in form aforesaid assessed; but that, for his said costs and charges, no sum by the Barons here be awarded or adjudged

of increase to the plaintiff. And the defendant in mercy, &c." *Parke, B.*, on a summons before him at chambers, was of opinion, that the judgment in this form did not authorize the defendants in taxing costs upon the two issues found for them.

(a) *Douglas*, 678.

(b) 5 B. & Adol. 536.

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that the Court has power over the Judge's certificate, for the purpose of its being entered on the *postea*; and therefore it must have the power also of ordering it to be taken off. So under the 8 & 9 *Will.* 3, c. 11, s. 4, which enables a Judge to certify to give the plaintiff full costs, where the trespass is wilful, the certificate may be entered at any time. In *Rennells v. Edwards* (a), a motion was made to set aside the Judge's certificate under the latter act, which was refused, only because it was considered that the statute was compulsory upon the Judge. He also cited a late case in the *King's Bench*, where a motion was made to that Court to strike out a certificate, which was refused; but the Judges directed the parties to attend before the Judge, which they did, and the certificate was struck out by him.

Per Curiam.—As the certificate is given by act of Parliament, which invested the Judge with power to certify or not, as he thought proper; and as the learned Judge has exercised his discretion in this instance, the Court has no authority to take off this certificate, or to interfere. The cross rule they said must be discharged.

Richards, in support of the first rule, referred to *Milner v. Graham* (b), where a doubt was entertained upon the construction of the 74th rule, whether, as it spoke of deducting the costs, the defendant was entitled, at all events, to have his costs from the plaintiff, or merely had the right to deduct where there were costs on the other side.

PARKE, B.—The first rule will be absolute, and the other discharged.

(a) 6 Term Rep. 11.

(b) Ante, Vol. 2, 422.

ALDERSON, B.—The defendants will be entitled to tax their costs upon the two issues, and the plaintiff will lose his costs on the first issue by the Judge's certificate.

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Rule for taxing the costs of the two issues to the defendants absolute, and the other rule discharged.

The rule for taxing the costs of the two issues to the defendants was drawn up with this additional clause, "and that the costs, when so taxed, be paid by the plaintiff to the defendants, their attorney, or agent."

Whateley obtained a rule *nisi* to amend the rule, by striking out the latter part of it, which ordered the plaintiff to pay the costs; contending, that the effect of that order would be to make the plaintiff personally liable, and that the Court had no power to make such an order. There was an affidavit that the defendants were asked whether they meant to enforce the payment of these costs; and that they gave an ambiguous answer, that they did not mean to issue execution.

R. V. Richards opposed the rule, and contended that the power of the Court to make such a rule depended on a variety of facts, which were fully gone into in the affidavits when the previous rule was discussed; and that sufficient did not appear on the affidavits to enable the Court to alter its previous judgment.

PARKE, B.—That part of the rule must have crept in by mistake. The Court had no power to order the plaintiff to pay the secosts. If the defendants are entitled to

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them, they are so on the statute of *Hen. 8 (a)*. The only legal mode for the defendants to get them is, by having a judgment for them entered on the record, and the plaintiff will then have an opportunity of disputing the defendants' right to such judgment by writ of error, if the defendants think proper to enforce their judgment. The record may be amended by the Judge's order.

Rule absolute on payment of costs, the defendants being at liberty to amend the judgment roll, by entering judgment for the costs of the issues found for them.

(a) 23 Hen. 8, c. 15, s. 1, which enacts, that "in trespass upon the statute 5 Rich. 2, stat. 1, c. 8, debt, covenant, detinue, account, trespass on the case, or upon any statute for an offence or wrong personal, immediately supposed to be done to the plaintiff, if the plaintiff, after the appearance of the defendant, be nonsuited, or a verdict pass against him, the defendant shall have judgment to recover his costs against the plain-

tiff, to be assessed and taxed by the discretion of the Judge or Judges of the Court where such action shall be commenced or sued; and shall have such process and execution for the recovery of the same against the plaintiff, as the plaintiff should or might have had against the defendant, in case judgment had been given for the plaintiff." See *Milner v. Graham and Another*, ante, Vol. 2, p. 422.

NEWTON'S Bail.

Notice of justification of bail, where further time has been obtained, must be given before 3 o'clock on the day the order is made.

ON these bail coming up to justify, *Busby* objected that there had been an order for further time to justify, and that the notice of justification, instead of being served before 3 o'clock on the day the order was made, according to the rule of *T. T. 59 Geo. 3 (a)*, had not been served till the evening of that day.

(a) This rule directs that "every notice for justifying bail in person shall be served before 11 o'clock in the forenoon of the day on

GURNEY, B.—The notice is irregular: it ought to have been given before 3 o'clock.

Bail rejected.

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NEWTON'S
Bail.

Heaton afterwards applied to the Court for further time to justify bail, and that proceedings might be stayed. It appeared that no declaration had been filed.

Busby asked that the bail-bond might stand as a security.

LORD ABINGER, C. B.—As there has been no declaration, the bail-bond cannot be required to stand as a security; and therefore, on payment of costs, the defendant may be let in.

GURNEY, B.—The bail must come up to-morrow morning.

which, according to the present practice, such notice ought to be served, *except in case of an order of the Court for further time*, in which case it shall be sufficient to serve the notice before 3 o'clock in the afternoon of the day on which

such order shall be granted; and in all the cases aforesaid, the affidavit of service shall specify the time of day at which such notice shall have been served." 2 B. & Ald. 818.

END OF TRINITY TERM.

KING'S BENCH PRACTICE COURT.

Michaelmas Term,

IN THE SIXTH YEAR OF THE REIGN OF WILL. IV.

1835.

HUNT's Bail.

"*Ely*, in the county of *Cambridge*," is a sufficient description of a bail's residence in an affidavit of justification.

It is sufficient for bail to swear himself not to be bail for any "defendant" except in the action wherein he becomes bail.

If a bail swears to sufficient property "over and above all his just debts," without the words "what will pay," the affidavit is good.

GUNNING opposed bail on the ground of a defect in the affidavit of justification. The bail described himself generally as "of *Ely* in the county of *Cambridge*." This, he submitted, was not sufficient, as *Ely* contained seven thousand inhabitants. It contained streets, and therefore the residence of the bail might be given according to the rule in a more particular manner, by stating the street and the number in and at which the bail resided. [*Littledale, J.*—I think this is a sufficient description of the bail's residence.]—He then objected that the bail, contrary to the form of the rule, had sworn himself to be worth the sum for which bail was to be given, "over and above all his just debts," instead of "over and above *what will pay* his just debts," as required by Reg. Gen. H. T. 2 W. 4, s. 19 (a). The form of the rule ought to have been strictly pursued, and the words "what will pay" could not be discarded as surplusage. [*Littledale, J.*—I think the terms of the rule are sufficiently complied with.]—He then objected, that the bail swore himself not to be bail "for any *defendant*" except in this action.

(a) Ante, Vol. 1, p. 185.

This he submitted was not sufficient, because it was consistent with that allegation that he was bail for a plaintiff in error, who might have been a defendant below.

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HUNT'S Bail.

LITTLEDALE, J.—In this case also I think the rule has been sufficiently pursued.

Bail passed.

DOE d. BUTT v. KELLY.

PLATT shewed cause against a rule obtained by *Theisiger* for an attachment against a person named *Morley* for not obeying a *subpoena duces tecum*. Several affidavits were produced on the part of the defendant in the attachment, for the purpose of shewing that the instrument required to be produced was immaterial on the trial.

It is not competent for a person served with a *subp. duces tec.* to shew that the instrument he was required to produce was immaterial in the cause, in answer to a rule for an attachment.

LITTLEDALE, J.—It is unimportant in this proceeding, so far as the witness is concerned, whether the instrument which the *subpoena* required to be produced was or was not material. He was bound to attend according to the exigency of the writ.

The case was then disposed of on other grounds, and the rule made absolute for an attachment.

Rule absolute.

GEORGE v. FRY.

F. V. LEE moved to discharge a defendant out of custody under 48 Geo. 3, c. 123, he having remained in execution for twelve successive calendar months for a debt not exceeding twenty pounds. The notice had been served on a female at the residence of the plaintiff.

In order to obtain a discharge under 48 Geo. 3, c. 123, it is not sufficient that the notice should be left "with a female at the plaintiff's residence."

LITTLEDALE, J.—That is not sufficient. The female

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might have been some person quite unconnected with the creditor. The present rule therefore cannot be granted.

Rule refused.

Ex parte Woolright.

Where an attorney has given notice of his intention to apply for admission on the first day of a term, and it appears that some of the necessary entries have not been made, through the neglect of an agent, in due time for that term, but have been made two days before it, the Court will allow him to be admitted on the last day of term, the entries continuing, and the notices being duly altered.

ARMSTRONG applied to admit an attorney under the following special circumstances. All the notices had been given for the first day of the Term, and the necessary entries made, with the exception of those in the books of the four puisne Judges of the Court. The reason of that omission was, the negligence of the person entrusted to make the entries. He had been desired to enter the name of the applicant in the books of all the five Judges, but had only entered it in the book of the Chief Justice. As soon as the omission had been ascertained, which was not until the 29th of *October*, the proper entries were made. He cited *Ex parte Herbert (a)*, where it was held that severe illness, under certain circumstances, will be considered as an excuse for not complying with the rule of Court in putting up notices in the *King's Bench* office and outside the Court of *King's Bench*, a Term before applying for admission as an attorney.

LITTLEDALE, J.—It appears that all the entries have been regularly made before the commencement of this Term. If they are allowed to continue until the end of the Term, they will have continued a sufficient period to comply with the exigency of the rule. The applicant may, therefore, be admitted on the last day of the Term. The notices of his intention to apply, which are for the first day of this Term, must be altered to the last day, at which time he may be admitted.

Admitted accordingly.

(a) Ante, Vol. 2, p. 172.

1835.

Ex parte RICHER.

AUSTIN applied for the discharge of a defendant under the 48 Geo. 3, c. 123, who had remained in execution twelve successive calendar months for a debt not exceeding twenty pounds. The peculiarity of the case was, that the plaintiff was dead, and therefore the notice had been served on the attorney who had conducted the cause to execution. Under these circumstances notice had been served on the only person on whom the defendant could be expected to effect such a service. He referred to the case of *Wilson v. Mokler* (a), in which it was decided, that, where a plaintiff's residence cannot be found, the defendant who applies for relief under the 48 Geo. 3, c. 123, may serve the notice required by that statute on the plaintiff's attorney. Here, the plaintiff's residence certainly could not be found, for he was dead, and therefore, according to that case, enough had been done to entitle the defendant to his discharge.

Where a defendant seeks to obtain his discharge under the 48 Geo. 3, c. 123, the plaintiff being dead, he must serve the notice on the personal representative of the deceased, or shew that there was no personal representative, before a notice to the attorney of the plaintiff will be considered sufficient.

LITLEDALE, J.—The practice of the Court has always been to require the notice to be served on the plaintiff himself. He being dead, the service should be on his personal representative. It ought certainly to be shewn, that there is no such person, before an application like the present can be granted. Service on the attorney, in fact, amounts to nothing. It is more than probable that an attorney who had conducted a suit for the recovery of twenty pounds as far as execution, would, after a lapse of twelve months, know nothing about it, and disclaim all interference in the case.

Rule refused.

It appearing, on a subsequent day, that the plaintiff's

(a) Ante, Vol. 1, p. 549.

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Ex parte
RICHES.

wife was living, but that the plaintiff had died intestate, and no administration had been taken out, a rule *nisi* was granted, to be served on the wife and the attorney in the cause; which was afterwards made absolute.

WOOD v. GOMPERTZ.

On an application to bring up a defendant under the compulsory clauses of the Lords' act, service of the notice on a creditor by serving it on the landlady of the house in which he lodges, is insufficient, unless it is sworn that she states herself to act as the servant of the creditor, and that such statement is believed to be true.

F. V. LEE applied for a rule to bring up the body of the defendant under the compulsory clauses of the Lords' act. He thought it necessary to call the attention of the Court to the mode in which it appeared by his affidavit that the notice had been served on one of the detaining creditors. It had been served on the landlady of the house in which the creditor lodged. This he submitted was sufficient under the statute. He was aware of the case of *Gardner v. Green (a)*, where it was held, that service of a rule *nisi* to compute was insufficient, if made on the defendant's landlady. The Court might be of opinion that such service was insufficient where its nature depended entirely on the discretion of the Court. But here, reference must be had to the words of the act of Parliament, which required the notice to be given "to all and every other creditor and creditors of every such prisoner." There was nothing in these words to shew that a service on the landlady of the house in which the creditor resided would not be sufficient.

LITTLEDALE, J.—The constant practice is, either to serve the creditor himself or some person necessarily connected with him at his place of abode. Here, the creditor had for his place of abode a lodging, and, therefore, the service should have been either on himself or some person necessarily connected with him at his lodging. The land-

(a) Ante, Vol. 3, p. 343.

lady would not be likely to be his servant, or to know any thing about his private affairs, any more than about those of any other of her lodgers.

Rule refused.

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On a subsequent day *Lee* produced an affidavit, in which it was sworn that the landlady had stated herself to act as the servant of the creditor, and that the deponent making the affidavit swore that he believed her statement to be true.

LITLEDALE, J., on the production of this amended affidavit, granted the rule.

Rule granted.

STEVENS v. The Mayor of BERWICK-UPON-TWEED.

W. H. WATSON moved for a rule to shew cause why the plaintiff in the present case should not be at liberty to inspect the guild books of the corporation of *Berwick-upon-Tweed*. The plaintiff was an attorney and a burgess, and the present action was brought against the corporation for business done as an attorney. He was desirous of obtaining the inspection now prayed for, in order to prove his retainer. Being a corporator, he had an interest in the books of the corporation, and was entitled to an inspection of them.

The circumstance of an attorney being a burgess does not entitle him, in an action against the corporation for costs, to inspect the corporate books in order to prove his retainer.

LITLEDALE, J.—The plaintiff's claim here has nothing to do with the affairs of the corporation. If you require the books at the trial, you must give notice to produce them; and if they are not produced, you may give secondary evidence of their contents. Such applications as the present are granted only in those cases where the opposite party stands

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in the situation of a trustee for both parties. That is not the case here. It is true that the plaintiff has a right to inspect the books, where his rights as a burgess are affected; but here his rights as a burgess do not come in question: and the mere accidental circumstance of his being a burgess cannot give him a right to inspect the corporation books for the purpose of sustaining his private claims. If such applications were allowed, the time of public officers would be perpetually occupied in consequence of them.

Rule refused.

DOE *d. TREAT* v. ROE.

Service on an agent on the premises, the tenant being abroad, is sufficient to entitle the lessor of the plaintiff to a rule nisi against the casual ejector.

ATTREE moved for judgment against the casual ejector. The affidavit on which he applied stated that the deponent had effected a regular service on a person on the premises sought to be recovered, and who said that he was agent of the tenant in possession, but that the latter was then at *Hamburgh*.

LITLEDALE, J.—That is sufficient to entitle you to a rule for judgment, but it must be *nisi*.

Rule *nisi* accordingly.

HICKMAN v. DALLIMORE.

Where it is clear that the defendant keeps out of the way to avoid being served, the Court will grant a *distringas*, although three calls and two appointments have not been made.

TURNER moved for a *distringas*. The affidavit on which he moved did not, in the ordinary way, shew that there had been three calls and two appointments made to attend at the residence of the defendant, and a copy of

the writ of summons left; but it stated that there had been several calls, and that two letters had been written directed to the defendant, one stating that proceedings would be taken for the recovery of the plaintiff's demand, and the other that a *distringas* would be applied for. It also stated, that, on two different occasions when the deponent had gone to the defendant's house, he had seen the defendant's sons there, had once left a copy of the process, had explained the object of the call, and desired to see the defendant. The sons on both occasions stated that the defendant was at home, and on one occasion one of the sons said that his father would never allow himself to be served with the writ; but that, if the deponent put his letter (being the letter stating that the *distringas* would be applied for) into a letter-box which the son pointed out, his father would get it. Upon these facts *Turner* submitted that the circumstances were distinguishable from the ordinary case, where the party calling was told the defendant was not at home. Here, he was at home, and would not allow himself to be served. Where a party so acted, he submitted that it must be fruitless to pursue the ordinary course, and that a writ of *distringas* should be granted.

LITLEDALE, J.—I think, as it is clear the defendant is keeping out of the way to avoid being served, you may take your writ.

Rule granted.

CROSS v. WILKINS.

HOGGINS applied for a writ of *distringas*. The affidavit on which he moved stated, that three calls, and two appointments at the two last calls, had been made, and the copy left at the third call. All the three calls, how-

In order to obtain a *distringas*, it is necessary that all the calls should be made on different days.

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ever, had been made in one day. This he submitted was immaterial, it appearing that the defendant was keeping out of the way to avoid being served. He cited *White v. Western* (a), where it was held that the attempts to serve a summons in order to obtain a *distringas* may be made in the same day, if it appears that the defendant is purposely keeping out of the way. There, two calls were made in the same day.

LITTLEDALE, J.—I think you have not entitled yourself to the writ. The case cited is distinguishable from the present, for there, two only of the calls were made in one day; but here, all the three were so made. But I would not be understood as acquiescing in that decision of Mr. Justice *Parke*, so that, if only two of the calls in the present case had been made in one day, I should not have granted the writ. I think that all the calls ought to be made on separate days.

Rule refused.

(a) Ante, Vol. 3, p. 451.

FRODSHAM v. MYERS.

The absence of a plaintiff abroad, unless it is shewn to be of a permanent character, is not a ground for compelling him to give security for costs.

SMITH moved for a rule to shew cause why the plaintiff should not give security for costs, on the ground that since the commencement of the action he had volunteered into the service of the Queen of *Spain*, and was now resident in that country. The affidavit did not, however, state that he had permanently taken up his abode there.

LITTLEDALE, J.—I do not think that enough is here stated to entitle you to call upon the plaintiff to give security for costs. If it were shewn that he had gone to reside permanently abroad, it would be different. But, consistently with the statements contained in the affidavit here,

the plaintiff may return in a week or two. As to the statement, that he is resident abroad, that carries the case no further, because, if he had only gone on a tour of pleasure during the vacation, he would of course be resident in the country through which he was passing on his tour. If he were on such a tour, no ground would be laid for calling upon him to give security for costs.

Rule refused.

COOPER v. WHEALE.

WORDSWORTH moved for a rule to shew cause why the writ of summons in this case should not be set aside on the ground of irregularity. By section 1 of the 2 Will. 4, c. 39, it was provided with respect to the writ of summons, that, "in every such writ and copy thereof the place and county of the residence, or supposed residence, of the said party defendant, or wherein the defendant shall be, or shall be supposed to be, shall be mentioned." Here the writ was directed to the defendant as "of *Tuiston-street*, in the county of *Middlesex*," without mentioning the parish or place within which *Tuiston-street* was situated. Another objection was, that, in describing the form of action, it stated the form to be "promises," instead of "on promises," as required by the form contained in the schedule to the Uniformity of Process Act.

LITLEDALE, J.—I think these objections ought not to prevail. It appears to me that "*Tuiston-street*, in the county of *Middlesex*," is a sufficient description of the defendant's residence. It is not necessary to introduce the particular town and vill in the county within which the particular street may be situated. As to the other objection, it is a mere clerical error, and does not at all interfere with the validity of the writ.

Rule refused.

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"*Tuiston-street*, in the county of *Middlesex*," is a sufficient description of a defendant's residence in a writ of summons.

The omission of the word "on" before the word "promises," in describing the form of action in a writ of summons, is immaterial.

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FIDLETT v. BOLTON.

An affidavit of service must swear to the service of the "rule annexed," and not merely of the "rule in this cause."

BALL moved to make a rule absolute on an affidavit of service. Some doubt existed as to whether the affidavit was sufficient. The deponent swore to the service of "a copy of the rule in this cause," the affidavit being headed in the cause, instead of "a copy of the rule hereunto annexed."

LITLEDALE, J.—I think that it is not sufficient. The affidavit must be amended and re-sworn.

Rule refused.

ADE v. STUBBS.

The rule for quashing a *sci. fa.*, on the application of the plaintiff after appearance and before plea, is *nisi* in the first instance, although on the terms of paying costs.

PETERSDORFF moved for leave to quash a writ of *scire facias* to revive a judgment at the instance of the plaintiff, on payment of the defendant's costs. The defendant had appeared, but had not pleaded. The reason of the plaintiff's application was, that some part of his proceedings were not strictly conformable with the practice of the Court. The plaintiff was entitled as a matter of course to quash his own writ, on payment of costs to the defendant. It was so treated in the case of *Pickman v. Robson* (a). The only question was, whether the rule for quashing the writ ought to be absolute or *nisi* in the first instance. The case might be compared to that of a discontinuance. There, the plaintiff might, at any time before plea pleaded, at once discontinue, on paying the defendant his costs. The defendant could not object to his doing so, and, therefore, he could have no cause to

(a) 1 B. & Ald. 486.

shew against a rule or summons which might be granted for that purpose. In the same manner, by parity of reasoning, he could have no cause to shew against a rule for quashing the *scire facias*. It was therefore submitted, that the rule should be absolute in the first instance.

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LITLEDALE, J.—I think, upon the whole, the rule ought only to be *nisi* in the first instance. The defendant may have some reason to urge why the plaintiff should not quash his writ.

Rule *nisi* accordingly (a).

(a) See 1 Reg. Gen. H. T. 2 Will. 4, s. 78, where it is ordered, that "a plaintiff shall not be allowed a rule to quash his own writ of *sci. fa.* after a defendant has appeared, except on payment of costs." Ante, Vol. 1, p. 193.

HINTON v. STEVENS.

KELLY shewed cause against a rule *nisi*, obtained by **Steer**, for setting aside the declaration in this cause, and notice thereof, and all subsequent proceedings thereon, for irregularity. It appeared from the affidavit, on which the rule had been obtained, that the defendant had been served with a copy of a writ of summons about the 7th or 8th of *August* last. That writ was directed to "**Joshua Edwards**," the defendant's name being "**Joshua Stevens**." On the 30th of *October*, the defendant was served with a notice of declaration filed in the cause. In the notice and in the declaration the defendant was described as "**Joshua Stevens**." The ground of the present application was, that the declaration varied from the process on which it was founded. Now, if this were any objection, it was

If a copy of a writ is served in vacation, objection to it for irregularity must be taken in vacation, if there is time for that purpose.

An objection to a notice of declaration on the ground of variance from the writ, must be taken within four days from the time of serving the notice, whether in term or vacation. An intermediate *Sunday* counts as one of those days. Some of

the days falling within term, and some in vacation, is immaterial.

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one which depended on the writ itself, a copy of which had been served on the defendant. That being so, the objection was taken too late; for, the present rule was not obtained till the 4th of *November*, and the defendant himself stated that he had been served on the 7th or 8th of *August*. It was ordered by *Reg. Gen. H. T. 2 Will. 4*, s. 38 (a), that applications for setting aside proceedings for irregularity must be "made within a reasonable time;" and in *Tyler v. Green* (b), it was decided, that, where a writ was served on the 25th of *October*, an application on the 3rd of *November* to set aside the service for irregularity, the 2nd being a *Sunday*, was out of time, and that it should have been made on the 1st. [*Little-dale, J.*—I think the application is not too late, if it ought to have been made in term time, and not in vacation. The question is, whether it ought to have been made in vacation, or whether the defendant might wait until term.] The application ought to have been in vacation. The case cited was an authority to that effect. In *Cox v. Tullock* (c), it was held, that, where there is an irregularity in any proceeding had in vacation, and there is time in the course of that vacation to apply to a Judge at Chambers, it is imperative upon the party complaining to do so; and he cannot wait to move to set aside the proceedings till the first four days of the next term, though there has been no intermediate step taken. But a still stronger reason could be urged for requiring applications of this sort to be made in vacation. Since the Uniformity of Process Act, proceedings were carried on both in vacation and in term. A party might now proceed to judgment and execution in vacation. If a defendant, therefore, were allowed to defer his application with respect to the writ until the following term, the most monstrous consequences would result. A defendant might come to set

(a) Ante, Vol. 1, p. 187.

(b) Ante, Vol. 2, p. 439.

(c) Ante, Vol. 2, p. 47.

aside a writ after execution had been issued. The Court would scarcely be inclined to decide, therefore, that an application with respect to the writ must not be made in vacation. But supposing the objection to be to the declaration, on the ground of a variance from the writ, that cannot be considered as a ground for setting it aside; for, in the declaration he is called by his right name. He is also called by his right name in the writ itself, although in the copy he is called by a wrong one. [*Littledale, J.*—In the copy you call him by his wrong name; but he may be taken to admit that he is to be called by the name mentioned in the copy. If so, then the declaration ought to correspond with it.] Then the application is too late; for, notice of declaration was served on the 30th of *October*, and therefore, according to the practice of the Court, which at most allows four days for such applications, he ought to have come on the 3rd of *November*, but, instead of that, he did not come till the 4th. He was, under any circumstances, therefore, too late in his application; and, consequently, the present rule ought to be discharged.

Steer, in support of the rule, contended, that the defendant was not bound to take any notice of the process which had been served upon him in the month of *August*. That was a writ against another person, of whom he knew nothing. He could not be bound, therefore, to pay any attention to process issued against a stranger, a copy of which the plaintiff thought proper to serve on him. He had no reason for coming to the Court or a Judge, until he found that an appearance had been entered for him; and notice of declaration was served on him. Under any circumstances that declaration must be irregular. If the declaration was founded on the copy served, then it was irregular on the ground of variance; if it was not founded on the copy served, then it was irregular, because there

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was no process to support it. The next question was, to what tribunal the defendant ought to have recourse. Out of term he must go before a Judge, but, during term, the Judges had always held, that the proper tribunal was the Court. If so, the defendant had made his application in ample time, even according to the rule suggested on the other side, that it should be made within four days. Here, the application was made on the second day of term, and, therefore, in any point of view, the defendant had been guilty of no *laches*, and, consequently, the present rule ought to be made absolute.

LITLEDALE, J.—I think the defendant was not bound to take any notice of the process served in *August*, or to apply at all with respect to it; but that he might wait to see whether the plaintiff would do any thing upon it. Then, on the 30th of *October*, notice of declaration is served upon him by the name of *Stevens*. That was clearly irregular; for, supposing the writ to be regular by the name of *Edwards*, the declaration being in the name of *Stevens*, there was a variance. Or, if the declaration should be considered as regular, then *Stevens* has never been served at all. Then comes the question, whether the application has been made in time. If the motion ought properly to be made in term, then the defendant has the whole first four days of the term within which to make the application; if this be such a motion, then the defendant has applied in due time. But, supposing it is not such a motion, then the defendant must have come to chambers. No doubt, if the question were as to the service of the writ, the defendant ought to have come to chambers in the vacation, because all the proceedings in a cause may be taken now in many cases in vacation. But that is now immaterial to consider, because the question is confined to the regularity of the declaration. The notice was served on the 30th of Oc-

tober. The defendant might have applied on *Saturday*, the 31st. The days begin to run, therefore, from *Friday*, and he was bound to come in four days. The question is, whether the day in vacation can be reckoned with those in the term, so as to make out the four days. I think they can. Then comes the question, whether the intervening *Sunday* is to be reckoned one of them. If it is, the application is too late; if it is not, then it is in time. My present impression is, that it ought to be reckoned as one of them, and, consequently, that the application on the 4th of *November* was too late.

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LITLEDALE, J.—I have spoken to the other Judges with respect to this case, and we are of opinion that the defendant ought to have applied in the vacation, and within four days from the service of the notice of declaration. The fact of the last two of those days falling in term time makes no difference. He should have come within four days from the service, whether in term or vacation. We think *Sunday* must be reckoned as one of them. The present rule will therefore be discharged without costs, and the defendant will have a week's time to plead.

Rule discharged without costs.

PIGGOT v. KILLICK.

DAYMAN applied to enter up judgment on a warrant of attorney, more than eleven years old. The peculiarity of the case was, that the defendant was a lunatic, and had been confined for some time past. There was no probability of his recovering soon, nor indeed did there appear to be any limit to the time which he would remain insane. By the practice of the Court, the warrant being

It is no objection to signing judgment on a warrant of attorney under fifteen years old, that the defendant is insane.

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under fifteen years old, a rule *nisi* for entering up judgment upon it was unnecessary. No objection, therefore, could be made on his part to the signing of judgment. There could be no reason, consequently, why judgment should not be signed, although the defendant was a lunatic.

LITLEDALE, J.—I do not see any reason why you should not sign judgment, although the defendant is insane. The Court could not hear the defendant, if he were sane, against the rule for judgment upon the warrant.

Rule granted.

CROMER v. BROWN.

It is no objection to an application for judgment as in case of a nonsuit, that issue was joined seven years previous.

W. H. WATSON shewed cause against a rule *nisi* obtained by *Austin* for judgment as in case of a nonsuit. Issue had been joined in *Michaelmas* Term, 1828, and the application was now made for judgment as in case of a nonsuit. He submitted to the Court, that, after this long delay, it might be considered as doubtful whether the defendant was entitled to make such an application.

Austin, in support of the rule, contended, that, according to the language of the statute 14 *Geo. 2*, c. 17, no objection could exist. The Court was bound to make such a rule, unless further time was granted for reasonable cause shewn upon just and reasonable terms.

LITLEDALE, J.—I think the lapse of time is not an objection to the motion.

W. H. Watson then produced an affidavit, by which it was rendered doubtful whether a proper service of the rule had been effected.

LITLEDALE, J., accordingly directed the rule to be enlarged until *Hilary* Term.

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Rule enlarged accordingly.

HARRIS v. GRIFFITH and Others.

STEER shewed cause against a rule obtained by *Miller* for setting aside the service of the writ in this case, on the ground of misnomer. He should, however, take a preliminary objection to the application, on the ground that the affidavit was improperly intitled. The names of the plaintiff and the defendants were properly stated; but although the plaintiff was described in the title of the affidavit as "plaintiff," yet the defendants were not described as "defendants." This, he submitted, was a fatal objection.

In intitling an affidavit, the parties should be described as "plaintiff" and "defendant."

Miller, in support of the rule, contended that it was not necessary to describe the parties as "plaintiff" and "defendants," as it must be clear from the intitling the affidavit in this case, that the parties in question were defendants. The title of the affidavit was, "between *Lewis Harris*, plaintiff, and *John and Edward Griffith* (sued as *Edward Griffiths*). It must be quite clear from this that *Edward Griffith* was a defendant, because he was sued, the plaintiff of course not being the person sued. But, in addition, it was to be observed, that the writ was attached to the affidavit, and the affidavit itself stated, that a copy of the writ attached had been served on the deponent, who was the defendant, and who so described himself. From these circumstances, it was unnecessary that the word "defendants" should be introduced in the title of the affidavit.

Cur. adv. vult.

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LITLEDALE, J.—The preliminary objection taken in this case, it appears to me, ought to prevail. It has been said, that the parties cannot be misled by the omission, because the defendant *Griffith* is described as “sued by the name of *Griffiths*,” and also, that a copy of the writ is attached to the affidavit, and that the deponent therein describes himself as “defendant.” I think that is not sufficient. The affidavit must speak for itself. If that were sufficient, then the word “plaintiff” might be omitted. Then it would be said, that the position of the names would be sufficient one over the other; and, ultimately, that they might be placed consecutively in the same line. I think, therefore, that the objection is fatal, and the present rule must consequently be discharged, but without costs.

Rule discharged, without costs.

RIPLING v. WATTS.

It is irregular to intitle a declaration of the Court on the back of it only.

BALL shewed cause against a rule to set aside the declaration in this case for irregularity, with costs. The irregularity complained of was, that it was not intitled in any Court, as it ought to be (a). It was, however, intitled at the back, and being on one sheet of paper only, that, he submitted, was sufficient.

Humfrey, contra.

LITLEDALE, J.—It ought to be intitled, as usual, on the face. If I were to decide that this was sufficient, declarations would never be intitled otherwise.

Rule absolute.

(a) 15 Reg. Gen. M. T. 3 W. 4; ante, Vol. 1, p. 474.

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Ex parte GLOVER.

STEER shewed cause against a rule *nisi* obtained by *J. Bayley*, for a writ of *habeas corpus* to bring up the body of a child of tender years, named *Houseman*, from the custody of a person named *Willis*, in order to restore it to the applicant, Mr. *Glover*. The affidavits in support of the application stated, that the child in question was the natural daughter of a person named *Elizabeth Houseman*, who had placed the child under the care of *Willis* when it was only a few days old. The mother died shortly afterwards, and, by her will, appointed *Glover* testamentary guardian to the child. It was now suggested that proper care was not taken of the child, and therefore, Mr. *Glover* was desirous of taking it out of the hands of *Willis*. It was also sworn, that Mr. *Glover* had regularly paid for the care and nurture of the child in accordance with the demands of *Willis*.

A mother cannot legally appoint a testamentary guardian of her natural child, and therefore such a guardian, if appointed, cannot have a *ha. cor.* to remove such child from the custody to which it was committed by the mother during her lifetime.

In the affidavits opposing the rule, none of those facts were disputed, except that all grounds were denied for the insinuation that the child was improperly treated. It was now objected, that Mr. *Glover* had no right to come to the Court to make the present application. On the face of the affidavits, he claimed as testamentary guardian under the will of the deceased mother. The mother, however, had no power to appoint such a guardian, and, consequently, her appointment must be void, and could confer no power over the child on her appointee. The decision of the case must depend on the construction to be put on the 12 *Car. 2*, c. 24, s. 8. The words of that section were, "That where any person hath or shall have any child or children under the age of one-and-twenty years, and not married at the time of his death, that it shall and may be lawful to and for the father of such child, whether born at the time of the decease of the

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father, or at that time *in ventre sa mere*, or whether such father be within the age of one-and-twenty years, by deed executed in his life-time, or by his last will and testament in writing, in the presence of two or more credible witnesses, in such manner and from time to time as he shall respectively think fit, to dispose of the custody and tuition of such child or children for and during such time as he or they shall respectively remain under the age of one-and-twenty years, and any lesser time, to any person or persons in possession or remainder, other than Popish recusants." The words of this section, it was clear, only applied to the father, and gave power to him only to appoint a testamentary guardian. That this was the true construction of the act of Parliament, appeared from the case of *Ex parte Edwards* (a). The decision in that case was, that, if a mother by will appoints a guardian, it is void, and the infant, if fourteen years of age, shall choose a guardian in Court. There were other cases in the note to the one cited, which were to the same effect. On these authorities, therefore, it was submitted, that the rule for the *habeas corpus* must be discharged.

J. Bayley, in support of the rule, contended, that the cases cited were not authorities in opposition to the present application. It did not appear from those cases, that the father was not alive. Here there was no father alive. If the father were alive, of course the mother could not appoint a testamentary guardian. That, however, could not interfere with the power of the mother, where there was no father in existence. But the parties here, with whom the child had been left, were estopped from objecting to the power of Mr. *Glover*, as testamentary guardian under the mother's will, since it was from the mother they had originally received the child, and by

(a) 3 Atk. p. 519.

the permission of the guardian it had continued in their possession, and from him they had received payment for the care and nurture bestowed upon it.

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LITLEDALE, J.—I think that the present rule ought to be discharged. I will, however, look into the cases.

Cur. adv. vult.

LITLEDALE, J.—It appears by the affidavits in this case, that the child in question was delivered to the person against whom the present application is made, by direction of the mother. It appears also, that the mother made a will, by which she constituted the applicant guardian of the child. That guardian has now applied for a writ of *habeas corpus* to bring up the body of the child and remove it from the possession of *Willis* and his wife. The writ of *habeas corpus*, in general, lies to bring up persons who are in custody, and who are alleged not to be legally restrained of their liberty. When the Court clearly perceives that they are illegally detained, it will discharge them. But the Court has also exercised a power to dispose of the persons of young children in certain cases. It is the universal rule, with some exceptions, that the father is entitled to the custody of a young child, even against the will of the mother. In case of there being no father, then the mother is the person next entitled to its custody. Here, the application is made at the instance of a person who stands in no degree of relationship to the child, but claims it as testamentary guardian under the will of the mother. If she were alive, she would have a right to the custody of the child. The question then is, whether, under such will of the wife, the applicant is entitled to the custody of the child. The common case of guardian in socage is out of the question. The only way in which a right to the child on his part can exist, is under the statute 12 Car. 2, c. 24, s. 8. Now,

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it has been held in a variety of cases, which are to be found collected in *Comyn's Digest*, and *Viner's Abridgment*, that that act does not apply to the mother, but that it is confined to the father. All, therefore, that this will amounts to, is, the mere declaration of a wish on the part of the mother that the child should be intrusted to the care of the person now applying. That is, however, not a sufficient title to enable the Court to interfere. If the child is not properly taken care of, an application may be made to the Court of *Chancery* to appoint guardians, if the child is entitled to property. I must presume, from the circumstances of this case, that the child is entitled to property. In 2 *Brown's Chancery Cases*, p. 583, which is referred to in *Comyn's Digest*, E. 2, it is laid down, that a man cannot regularly appoint a guardian to his natural child; but, if in fact he name guardians, the Court will appoint them, without referring it to the Master to examine who is proper to be appointed guardian. It is very likely, that, if Mr. *Glover* applied to the Court of *Chancery*, he would be appointed guardian. He has not here, however, made out a legal right to the custody of the child, and therefore this rule for a *habeas corpus* must be discharged, and the child allowed to remain in its present custody.

Rule discharged without costs.

REX v. SIMMS.

Where an overseer is rendered incompetent to serve, in consequence of a conviction under the 4 & 5 Will. 4, c. 76, s. 97, and an application is made for a *mandamus* to compel him to deliver up books &c. belonging to the parish, the conviction must be annexed to the affidavits in support of the rule.

A RULE *nisi* had been obtained for a *mandamus* to be directed to the defendant, commanding him to deliver over certain parish books and monies to the present overseer of the parish of *Brancaster*. The affidavits in support of

the rule stated, that the defendant, who was appointed overseer for the year 1833-4, had, in *December*, 1833, been convicted of wilful misapplication of the parish monies, under 4 & 5 *Will.* 4, c. 76, (the Poor Law Amendment Act) s. 97 (a); and that another person had been appointed in his place for the rest of the year; but that he refused to deliver over the books and monies of the parish. It appeared by the affidavits in answer, that no conviction had been drawn up, and, therefore, *Littledale*, J., called upon—

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Austin, in support of the rule; who contended, that the legal consequences of the conviction attached immediately upon the decision of the justices. The drawing up the conviction was merely form, and might be done at any time, even after the penalty had been levied. *Rex v. Barker* (b). The defendant, therefore, had ceased to be overseer, by the operation of the act of Parliament, from the moment when the conviction took place. It would, at all events, be sufficient, if the conviction were drawn up before the writ of *mandamus* issued, supposing it to be necessary to recite the conviction in the writ.

(a) "And be it further enacted, That, if any overseer, assistant overseer, master of a workhouse, or other paid officer, or any other person employed by or under the authority of the said guardians, shall purloin, embezzle, or wilfully waste or misapply any of the monies, goods, or chattels belonging to any parish or union, every such offender shall, besides and in addition to such pains and penalties as such person so offending shall, independently of this

act, be liable to, upon conviction before two justices, forfeit and pay, for every such offence, any sum not exceeding 20*l.*, and also treble the amount or value of such money, goods, or chattels so purloined, embezzled, wasted, or misapplied; and every person so convicted shall be for ever thereafter incapable of serving any office under the provisions of this or any other act in relation to the relief of the poor."

(b) 1 East, p. 186.

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LITTLEDALE, J., intimated that he was of a different opinion, but that he would consult the rest of the Court.

Cur. adv. vult.

The rule being again mentioned—

LITTLEDALE, J.—I have spoken to the other Judges, and we agree that the rule *nisi* for this *mandamus* ought never to have been granted. I agree with Mr. *Austin*, that there are many cases where it would not be necessary for a conviction to be drawn up immediately on the party being in fact convicted; but on a *mandamus* being granted, there is no opportunity afterwards of examining into the conviction. This is a rule for a *mandamus*, commanding an overseer to deliver over all books &c. belonging to a parish; and the ground on which it is moved is, that he has been convicted under 4 & 5 *Will.* 4, c. 76, s. 97. Now, this conviction not being drawn up and annexed to the affidavits, the overseer is not in a situation to make a return that there is no such conviction, so as to examine its validity. On an application for a *mandamus*, under circumstances like the present, the Court ought to see that there has been a good conviction, and whether it was before persons competent to decide. It seems to me, therefore, that the conviction not being annexed to the affidavits on which this rule was granted, it ought to be discharged.

Rule discharged.

Ex parte MORGAN.

Where an attorney applies for admission, it must be positively shewn that his notice has been regularly put up in the *King's Bench* office.

BALL moved to admit an attorney, who swore, in his affidavit as to putting up the necessary notices, that he

believes that he omitted to affix notice of his intended application in the *King's Bench* office. This omission had occurred from inadvertence. A case was mentioned, in which one of the notices of an attorney's intention to apply for admission had been improperly introduced into the book at the chambers of a Judge of the *Common Pleas*, instead of the book at the chambers of the *King's Bench* Judge.

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LITLEDALE, J.—In that case the requisite number of notices were put up; but one has been altogether omitted here. Besides, a notice in the *King's Bench* office is very different from an entry in the Judge's book. The *King's Bench* office is selected as one of the most public places for sticking up notices of declaration, rules, and other matters, where a special service of the notice or rule is to take place. The notice in the *King's Bench* office cannot be dispensed with. He may, however, give fresh notice of his intention to apply for admission on the last day of *Hilary Term*.

Rule accordingly.

CARSON v. DOWDING and Another.

BARSTOW shewed cause against a rule for setting aside a declaration for irregularity. The irregularity complained of was, that the writ of *capias*, on which one of the defendants had been arrested, was against them both, and the declaration was against one only. The question was, whether a plaintiff, having sued out bailable process against two defendants, on which one of them was arrested and gave bail, he could afterwards declare separately against one, instead of waiting until the other was arrested or appeared. It was contended that he might proceed separately against either of them. It must be

Where a plaintiff sues out a *capias* against two, and he arrests one only, he cannot declare against him alone.

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conceded, that, by the old law, previous to the passing of the Uniformity of Process Act, the plaintiff had not his option so to do: the cases of *Lewin v. Smith* (a) and *Moss v. Birch* (b) were authorities to that effect. A distinction did by the old law prevail between bailable and serviceable process. The case of *Wilson v. Edwards* (c) shewed this to have been the practice. The principle was, that, as the affidavit of debt disclosed a joint cause of action, the Court would not allow the plaintiff to proceed separately against the defendants. On the other hand, the plaintiff not having made an affidavit of debt in the case of serviceable process, no such objection applied. The question upon the present rule was, whether, since the passing of the Uniformity of Process Act, one of the objects of which was to facilitate the proceedings of plaintiffs against defendants, a plaintiff would now be at liberty to issue a joint bailable *capias*, and then declare against one only of the defendants. It was contended that the plaintiff had such a right. In the case of *Knowles v. Johnson* (d), it was held, that, where two of three parties to a bail-bond were declared against, it was no irregularity: and in *Coldwell v. Blake* (e), the Court held, that, upon a writ against several, a plaintiff may declare against one only; but if he declares against any other defendant afterwards, he will be irregular. These were authorities supporting the proposition for which the plaintiff contended. By section 4 of the Uniformity of Process Act the plaintiff was empowered, when he issued a *capias* against several defendants, to arrest one and serve the others. This was a power entirely new, for the plaintiff could not have done so previous to the passing of that act of Parliament. Now, it was but fair to conclude, that, when the legislature con-

(a) 4 East, 589.

(b) 5 T. R. 722.

(c) 3 B. & C. 734; 5 D. & R. 622.

(d) Ante, Vol. 2, p. 653.

(e) Ante, Vol. 3, p. 656.

ferred on the plaintiff a power of this description, it intended to give him the full advantage resulting from it. To enable him to declare against one, after arresting two, was only in furtherance of the object of the legislature in facilitating the plaintiff's remedy. There was the less reason to object to this construction, as it could be productive of no kind of inconvenience to the defendant. It might be said, that the defendant could plead in abatement. That was no objection to the declaration, if the plaintiff chose to submit to the chance of such a plea. He was aware of the rule of Court of 1 *Reg. Gen. M. T. 3 Will. 4(a)*, which required, "that every writ of summons, *capias*, and detainer shall contain the names of all the defendants (if more than one) in the action, and shall not contain the name or names of any defendant or defendants in more actions than one." That rule, however, would not interfere with the plaintiff's right, if the construction of the Uniformity of Process Act contended for was a correct one.

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Tyndale, in support of the rule, contended that the Uniformity of Process Act had made no difference in the practice of the Court on this point. The distinction between bailable and serviceable process must still be preserved. The reason of this distinction was obvious. In serviceable process there would be no objection to his issuing a writ against two, and declaring against one, because there was no affidavit of debt to bind him. In bailable process there was such an affidavit, and therefore he was bound by it.

Cur. adv. vult.

LITTLEDALE, J., the next day gave judgment.—This was an application made yesterday before my Brother

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Coleridge, to set aside a declaration on account of irregularity. The irregularity complained of was, that a *capias* had been sued out against two defendants, but the plaintiff had declared against one only. I think this was a clear irregularity. Previous to the Uniformity of Process Act, the plaintiff might sue out serviceable process against several, and declare against one of them only; but, where the action was commenced by bailable process, it was necessary that the plaintiff should frame his writ in the way he intended to declare. This was formerly the rule laid down, and there is nothing in the Uniformity of Process Act to vary this practice. It appears, therefore, to both my brother *Coleridge* and myself, that this declaration was irregular.

Rule absolute.

HOLMES v. MENTZE.

(Before the four Judges.)

Where a claim is made by a person, as partner of the defendant, on property seized by the sheriff, the Court will not grant that officer relief under the Interpleader Act, but will compel the plaintiff to indemnify the sheriff, if he denies the partnership.

KNOWLES had obtained a rule on behalf of the sheriff of *Lancashire*, calling on the plaintiff and a person of the name of *Heap* to state their respective claims to certain goods, taken in execution by the sheriff under a writ of *fi. fa.* issued at the suit of the plaintiff. The sheriff levied on the 17th of *February*, and on the 18th was served with a notice, signed *John Heap*, informing the sheriff that *Heap* was interested as partner with *Mentze* in the goods seized, and that, upon a balance of the partnership account, *Mentze* would be found to have no property in the said goods.

The *Attorney-General* and *M. Chambers* now appeared for the plaintiff, and contended, that this case did not come within the meaning of the Interpleader Act, as that act had been held not to apply where the claim made was

equitable and not legal (a). *Heap* claimed as a partner only, and the course for the sheriff to pursue was free from all difficulty. He had only to put up for sale the defendant's share in the partnership property, and sell it for whatever it would bring. This point had been expressly determined in *Parker v. Pistor* (b), and *Chapman v. Koops* (c).

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Sir *W. Follett* and *Knowles*, in support of the rule, contended that this case came within the meaning of the act, for it applied to all claims; and here *Heap* claimed the whole of the property. The Court had already decided that a claim in right of lien was within the act; *Cotter v. Bank of England* (d); and there seemed no good reason for the distinction sought to be established in this case. If the Court refused to interfere, the sheriff would be placed in a situation of great difficulty; for if he sold the whole of the goods seized under the writ, he would be liable to an action at the suit of *Heap*; and if he sold *Mentze's* interest only, he would be liable to an action at the suit of the plaintiff, who might then deny that *Heap* was a partner. Besides, the course for the sheriff to pursue in respect of partnership property was not so clear as had been assumed on the other side. Lord *Tenterden*, in *Burton v. Green* (e), said, "I am not quite satisfied as to the interest in the partnership property which the sheriff might have sold under the execution. There is difficulty in making the sheriff a tenant in common with the partners."

Sir *F. Pollock* and *Tomlinson* appeared for *Heap*.

(a) *Sturgess v. Claude*, ante, Vol. 1, p. 505.
 (b) 3 B. & P. 288.

(c) *Ib.* 289.
 (d) *Ante*, Vol. 2, p. 728.
 (e) 3 C. & P. 306.

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Per Curiam.—This is not a case within the meaning of the act ; a party does not make a claim merely by saying, “ I have an interest as partner.” The duty of the sheriff is to seize and sell such interest as the party has. The rule must be discharged ; but we think the plaintiff ought to indemnify the sheriff, if he denies that *Heap* is a partner. That may be the subject of another application.

Rule discharged.

Knowles, on a subsequent day, obtained a rule calling on the plaintiff to shew cause why the sheriff should not have time to return the writ until he was indemnified by the plaintiff. The application was made on an affidavit by Mr. *Bower*, the sheriff's attorney, stating that immediately after the determination of the former rule he had addressed a letter to Mr. *Florence*, the plaintiff's attorney, calling upon him to admit or deny that *Heap* was a partner with *Mentze*. Mr. *Florence* in reply said, that, acting under the advice of counsel, he declined answering the question.

The *Attorney-General* and *Tomlinson* shewed cause against the rule, and again referred to *Parker v. Pistor*, and *Chapman v. Koops*.

The Court made the rule absolute.

Rule absolute.

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GILMORE v. HAGUF.

(Before the four Judges.)

KNOWLES shewed cause against a rule which had been obtained by *G. T. White*, calling upon the plaintiff to shew cause why the defendant should not be allowed to plead, with other pleas, that the drawer of the bill of exchange on which the action was brought did not indorse the bill to the plaintiff. The defendant was sued as acceptor, and it was now sworn by the plaintiff that the defendant had negotiated the bill in question three years ago, bearing at the time the indorsement of the drawer, and had represented the drawer to be a respectable person, living in *Savoy-street*, in the *Strand*. The bill had been dishonoured at maturity, and a letter giving notice to the drawer, and which had been sent to the address furnished by the defendant, had been returned through the post-office, marked "gone away." The plaintiff had not since been able to discover the drawer. Under these circumstances, it was contended that the defendant ought not to be permitted to deny the drawer's indorsement, as he had admitted it when he negotiated the bill, and the plaintiff was now without the means of proving it.

The Court will not, in an action by the indorsee, allow the acceptor of a bill of exchange who negotiates it with the drawer's name indorsed, to plead that it was not indorsed by the drawer to the plaintiff.

G. T. White, in support of the rule, contended that the defendant was entitled to plead the plea in question. If the facts sworn to on the other side were true, and were proved at the trial, they would support a replication that the drawer did indorse the bill. There would, therefore, be no hardship on the plaintiff in permitting the plea.

Per Curiam.—It would not be reasonable to permit the defendant to avail himself of this plea, after he has ad-

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mitted the indorsement by negotiating the bill with the indorsement upon it.

Rule discharged with costs.

Ex parte YEATMAN.

Where a client has voluntarily paid money to his attorney, pursuant to an agreement, in itself void for champerty, the Court will not, after a lapse of thirteen years, interfere to compel the attorney to refund or deliver his bill, unless sufficient reason is shown for not making an earlier application.

SIR WILLIAM FOLLETT and *Butt* shewed cause against a rule *nisi* obtained by *Kelly*, requiring Mr. *George Tanner*, an attorney of the Court, to shew cause why he should not pay back to *John Charlton Yeatman*, the sum of 197*l.* 4*s.*, or such part thereof as the Court should order, together with the costs of the application, to be taxed by the Master; or, why he should not deliver his bill of costs, if any, to the said *John Charlton Yeatman*, or to his agent, for proceeding against the *Bristol Dock Company*, and after taxation thereof, pay the difference between the amount taxed, and the said sum of 197*l.* 4*s.*, to the said *John Charlton Yeatman*. The facts as they appeared from the affidavits on both sides were the following:—

In the year 1804, the *Bristol Dock Company*, under the authority of a local act of Parliament, took possession of certain land, in which the applicant *Yeatman*, and a person named *Kelson*, were jointly interested. For this land the company, notwithstanding various applications to them, did not pay. In the month of *May*, 1823, after some previous communications upon the subject, Mr. *Tanner* proposed to Mr. *Yeatman* and Mr. *Kelson*, that they should take proceedings against the company, in order to obtain liquidation of their claim. To this at first they objected, on the ground of the hopeless nature of the case, and the risk which would be incurred of costs. Mr. *Tanner* then proposed to take proceedings against the company on their behalf, at his own risk and expense,

undertaking at the same time that, if he should fail, he would charge them nothing, but if he succeeded he should receive one-third of the proceeds. To this Mr. *Yeatman* and Mr. *Kelson* acceded, and a memorandum in these terms was drawn up, and signed by each party. “*Kelson* and *Yeatman*, one-third each,—one-third to be paid for expenses. *Second*, no expenses to be paid by the parties in case of failure, or otherwise.” Three copies of this memorandum were made; each signed by all the parties; and one kept by each. Subsequently, Mr. *Tanner* laid the case before an eminent barrister, and, pursuant to his advice, commenced an action of ejectment against the company. Soon after the service of the declaration the company yielded to the claim; and about three months from the signing of the agreement, the clerk of the company paid to Mr. *Yeatman* and Mr. *Kelson* the sum of 59*l.* 12*s.* as the amount of those two gentlemen’s claim upon the company. Mr. *Yeatman* and Mr. *Kelson* then, in pursuance of the agreement, paid over the sum of 197*l.* 4*s.* to Mr. *Tanner*, as the third part of the proceeds resulting from Mr. *Tanner*’s exertions, and to which, according to such agreement, he was entitled. From that time to the year 1831, no objection was made on behalf either of Mr. *Yeatman* or Mr. *Kelson*, to Mr. *Tanner* retaining possession of the 197*l.* 4*s.* In that year a claim was set up by Mr. *Yeatman* of 28*l.* 7*s.* for journeys stated to have been taken by him with respect to the claim upon the *Dock Company*. Mr. *Yeatman* also required that the money should be returned, with the exception of such expenses as Mr. *Tanner* had necessarily incurred in prosecuting the claim upon the company. Mr. *Tanner* refused to yield to either claim, and in *Trinity Term*, 1835, the present rule was obtained. In answer to it, the lapse of time since the payment of this sum to Mr. *Tanner*, was a sufficient ground for discharging it. There was no pretence for saying that Mr.

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Yeatman was not perfectly aware of the nature of the agreement into which he was entering, or that he did not pay over the moiety of the 197*l.* 4*s.* voluntarily. That being the case, the Court would not, after nearly thirteen years had elapsed, call upon *Mr. Tanner* to refund this money, or to deliver a bill of his costs. Had it not been for that gentleman's exertions, neither *Mr. Yeatman* nor *Mr. Kelson* would have recovered any portion of their claim. That gentleman had undertaken the risk and expense of an action against a public company, from which a protracted litigation might be expected; and, although the company had yielded with a readiness which could not have been anticipated, yet if the costs had amounted to 1000*l.*, and years had been employed before the case was brought to a conclusion, *Mr. Yeatman* and *Mr. Kelson* would have incurred no greater liability. With respect to the lateness of the application, if any authority were necessary, the case of *Garry v. Wilks* (a) was conclusive against it. The marginal note of that case was, "Where an attorney was charged with oppression towards his client, but the application was not made till after three terms had nearly elapsed, and no attempt was made to explain the delay, it was held that the motion was too late." In the present case, as in the one cited, no explanation was given as a reason for the delay; and, therefore, the same course ought to be pursued in this case as in that, and the rule discharged. Besides, this application could not have been sustained, even had it been made immediately after the payment was made.—The money was not received by *Mr. Tanner* from a third person, but was paid to him by the party who now seeks to have it returned; it was so paid, with a full knowledge of all the circumstances of the case, and an action for money had and received would not have lain to recover it. This, then, is an attempt to obtain by motion, after

(a) *Ante*, Vol. 2, p. 649.

double the time allowed by the Statute of Limitations has expired, a sum of money for which an action would not lie.

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Kelly and Humfrey, in support of the rule, contended, that the original agreement under which the money was paid amounted to champerty, and therefore void in point of law. That being the case, the simple question was, whether the mere lapse of time was sufficient to prevent the Court from interfering to protect Mr. *Yeatman* from the consequences of such illegal agreement. If such a transaction as this were allowed to stand, it would be impossible to calculate to what extent a designing attorney might impose on the credulity or distress of his client. If the agreement from its illegality could not originally have been enforced, if it was utterly void in law, the Court would not think the mere circumstances of delay sufficient to prevent its interference. He referred to the case of *In re Masters and others* (a). The marginal note of that case was, "It is no answer to an application to tax an attorney's bill, that an agreement has been made that the attorney shall receive one half the proceeds of a suit, carried on at the instance of the client." There, Mr. Justice *Coleridge* observed, "the case becomes that of the ordinary motion for taxing an attorney's bill. What is the defence to the application? The attorney sets up an agreement between him and his client. But, if that agreement does not exist, or cannot be enforced, it is a matter of course to refer the bill. It is incumbent on the attorney to shew that such an agreement exists as the Court can uphold, in order to prevent taxation. Now, it is impossible to say that the agreement here stated, which is substantially champerty, can be upheld, so as to prevent the attorney from being bound to submit his bill for taxation.

(b) Ante, page 18.

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The agreement is, that he shall have one-half the proceeds of the action. That is an agreement which the Court cannot sanction. I think, therefore, in that point of view, the present rule must be made absolute." Here, an agreement was made, which was substantially champerty. In pursuance of that agreement, a sum of nearly 200*l.* was paid as one-third of the proceeds of the action commenced. As the *Dock Company* so soon yielded to the claim of the present applicant, it was impossible that a sum beyond 10*l.* could be due for costs. If it even amounted to 20*l.*, nearly ten times more than that amount had been received by the attorney. Surely the Court would not sanction such a proceeding as this, but would interfere to protect the client, although a considerable period had elapsed since the money had been paid. [*Littledale, J.*—The agreement was, to pay one-third of the proceeds, and no more, whatever might have been the amount of the costs. If they had amounted to 1000*l.*, he would have received no more.]—The lapse of time could not be considered as furnishing any answer to the application; for in the case of *Drapers' Company v. Davis (a)*, the Court interfered to tax an attorney's bill, although it had been adjusted seventeen years before. In *Wood v. Downes (b)*, beneficial contracts and conveyances, obtained by an attorney from his client during their relation as such, and connected with the subject of the suit, being also liable to the charge of *champerty*, were decreed to stand as a security only for what was actually due. In *Tidd's Practice (c)*, it was laid down, "when an attorney's bill has been settled and paid, yet the Courts under special circumstances will refer it to be taxed; for the client may, by affidavit, shew that the business charged was never performed, or that the charges

(a) 2 Atkyns, 295.

(b) 18 Ves. 120.

(c) Vol. 1, p. 332.

are fraudulent; and where that is the case, neither payment, nor a release, nor a judgment for the money due, will preclude the Court from having the bill taxed." In this case it must be clear, that a fraud had been practised on the client; and therefore, within the principle laid down by Mr. *Tidd*, the Court ought to interfere, and direct the present rule to be made absolute.

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LITTLEDALE, J.—This is an application against a person named *Tanner*, an attorney of this Court, to compel him to refund a sum of money alleged to have been wrongfully received by him in the year 1823; or to deliver his bill of costs, and, after taxation, to pay the difference between that sum and what should be found due on taxation. There are two cases, in which the Court exercises a summary jurisdiction over an attorney on applications of this description. One is, where money belonging to his client has come into his hands, and he has a bill of costs; the other is, where he has been employed not precisely in the character of an attorney, but as an agent, and the fact of his being an attorney has been the reason of his being so employed. This was the principle laid down *In the Matter of Aitkin* (a), and beyond that the Courts have never been inclined to go. If a party pay over money to an attorney voluntarily, that is not according to the cases within the rule, and the attorney will not be liable to refund. The question is, whether these proceedings being founded on an agreement which is illegal in itself, the Court will interfere to compel the attorney to refund or to deliver his bill. The agreement, it is said, must be considered as void for champerty, and the Court will therefore compel him to deliver a bill. But, it is to be observed, that no action has been brought against the attorney; no indictment preferred; no bill in equity filed to cancel this agreement.

(a) 4 B. & Ald. 47.

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Whether the Court would have interfered at the time of the agreement being made or soon after, I cannot say. This is not the case of a poor man; but it was an arrangement between the members of the family. If the parties had applied at the time, the Court would have dealt with it according to their discretion under all the circumstances of the case; but, it appears to me, that after a lapse of thirteen years the application comes too late. If it had been the case of a security which it was sought to set aside, the case might have been different. But here, the money has been voluntarily paid pursuant to the agreement. If the applicant had been under the pressure or in the power of the attorney, it might be different. Had an action been brought, or a bill in equity filed, the Statute of Limitations might have been pleaded, unless there was some legal reason alleged to account for the delay in bringing the action. I apprehend this Court would not interfere summarily in a way analogous to the bringing an action by the client, unless it appears that he was either not a free man, or in the power of the attorney. This application might have been made earlier, and no reason has been given, why he did not come sooner to the Court. The Statute of Limitations has run since this money was paid, and therefore I think this application comes too late. The present rule must therefore be discharged and with costs, as it was moved with costs.

Rule discharged with costs.

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MORGAN v. RUDDOCK.

WHATELEY shewed cause against a rule obtained by *Palmer* for setting aside a nonsuit. It was an action to recover the amount of an apothecary's bill, and the defendant pleaded *non-assumpsit* and a set-off. At the trial before the under-sheriff of the county of *Norfolk*, the plaintiff proved his claim to the extent of 11*l.* 9*s.* The defendant then submitted to the under-sheriff that the plaintiff must be called, as he had not, pursuant to 55 *Geo.* 3, c. 194, s. 21, proved that he had been actually practising as an apothecary before or on the 1st of *August*, 1815, or that he had obtained a certificate to practise as an apothecary pursuant to the provisions of that statute. On the part of the plaintiff it was contended, that this objection ought to have been taken by plea according to the new rules of pleading, and, not having been so taken, the plaintiff was entitled to recover for the sum proved to be due. The under-sheriff directed a nonsuit, with liberty to the plaintiff to move to set the nonsuit aside and enter a verdict for the plaintiff. The question depended, therefore, upon the construction which the Court should think it right to put on the new rule of pleading with reference to the 55 *Geo.* 3, c. 194, s. 21. The words of the pleading, rule 3, under the head of *assumpsit*, were, "in every species of *assumpsit*, all matters in confession and avoidance, including not only those by way of discharge, but those which shew the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded (a)." The meaning of that rule clearly was, that all matters which shewed the transaction to be essentially void must be pleaded, but did not extend to cases where

In an action for an apothecary's bill, the objection that the plaintiff was not in practice as an apothecary prior to or on the 5th of *August*, 1815, or had not obtained a certificate from the society of apothecaries, need not be pleaded, but may be rendered available under *non-assumpsit*.

(a) Ante, Vol. 2, p. 323.

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an act of Parliament prescribed the peculiar evidence which the plaintiff was bound to produce in order to entitle him to recover. The words of the 55 *Geo. 3*, c. 194, s. 21, were, "That no apothecary shall be allowed to recover any charges claimed by him in any Court of law, unless such apothecary shall prove on the trial that he was in practice as an apothecary prior to or on the said 5th day of *August*, 1815, or that he has obtained a certificate to practise as an apothecary from the said master, wardens, and society of apothecaries as aforesaid." Under this act of Parliament, a particular species of proof was required to be given by the plaintiff, before he could recover in any action which he brought for the recovery of his charges, but a noncompliance with it did not render the transaction fraudulent or illegal. Neither illegality nor fraud existed in the transaction out of which the claim arose in the present case, but the plaintiff was not prepared to prove that which the act of Parliament required he should as a condition precedent to his recovering. There was no reason; therefore, why the defendant should plead it, as by the language of the rule it was not required. Good reason might exist why the defendant should plead fraud or illegality in the transaction out of which the claim arose, because he must be aware of it; but none could exist for his pleading a matter of this sort, as it was a matter of evidence by no means affecting the transaction, and peculiarly within the plaintiff's own knowledge. If the Court were to hold that the defendant must plead such a matter as this, the effect of such a decision would be, to repeal the act of Parliament requiring this peculiar proof to be given.

Palmer, in support of the rule, contended that this was a matter evidently coming within the meaning of the rule, and, therefore, that the defendant ought to have pleaded it to the plaintiff's declaration. He cited *Moore v. Boul-*

cott (a), where, in an action on an attorney's bill, the defendant pleaded that the bill had not been delivered one month before action brought, and he contended that it had now become the constant practice of the profession to take such an objection by way of plea. In *Potts v. Sparrow* (b), it was held that, since the new pleading rules, the illegality of work and labour done cannot be given in evidence under the plea of *non-assumpsit*, but must be pleaded, although the illegality be not inferential, but essential. In *Barnett v. Glossop* (c), which was an action for the price of a dramatic piece, and the defendant sought to object under the plea of *non-assumpsit* to the fact of the agreement for the sale not being in writing pursuant to the 8 Anne, c. 19, s. 1, the Court held, that the defendant ought to have pleaded the objection. In this last case, if the objection was a good one, it depended, like the objection to the present case, on the provisions of an act of Parliament; and, as in that case, it was held that the objection ought to be taken by way of plea, so ought it to have been taken by way of plea in the present case.

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PATTESON, J.—If this were an illegal contract, then I think that the objection ought to have been made by plea. But the act of Parliament, as it appears to me, makes the proof, the defect of which is here urged as an objection, a condition precedent to the plaintiff's recovering; and therefore the defendant need not have pleaded the defect. I will, however, speak to the other Judges on the subject, and give my opinion to-morrow.

Cur. adv. vult.

PATTESON, J.—In this case the question was, whether it is necessary to plead the objection that an apothecary

(a) Ante, Vol. 3, p. 145.

(b) Ante, Vol. 3, p. 630.

(c) Ante, Vol. 3, p. 625.

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was not practising before the year 1815, and had not obtained his certificate from the apothecaries' society. The under-sheriff, before whom the trial took place, was of opinion that the objection could be taken under the plea of *non-assumpsit*, and accordingly nonsuited the plaintiff, on the ground of his not giving proof, either of such practice or certificate. The present rule was obtained to set aside that nonsuit, on the ground that the objection amounted to a suggestion of illegality in the transaction, and therefore ought to have been pleaded, in conformity with the third rule of *Hilary* Term, 4 *Will.* 4, under the head of "*assumpsit*," the words of which are, "In every species of *assumpsit*, all matters in confession and avoidance, including not only those by way of discharge, but those which shew the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded." It is said, that, according to the language of this rule, the objection ought to have been pleaded, and several cases have been cited for the purpose of supporting that proposition. In all those cases, the transaction on which the plaintiff's claim rested was illegal. The consideration was illegal; and the decision of the Court proceeded on such illegality. In those cases the Court decided that the defendant should not be at liberty to give evidence of the alleged illegality without pleading it. In this case, however, it was not sought to prove any thing for the purpose of defeating the plaintiff's claim; but the objection is, that he did not prove something which the 55 *Geo.* 3, c. 194, s. 21, required he should prove in order to entitle himself to recover. The words of that section are, "That no apothecary shall be allowed to recover any charges claimed by him in any Court of law, unless such apothecary shall prove on the trial, that he was in practice as an apothecary prior to or on the said 5th day of *August*, 1815, or that he has obtained a certificate to practise as an apothecary from the

said master, wardens, and society of apothecaries as aforesaid." It has therefore made the proof of the practice or certificate a condition precedent to the plaintiff's recovery, and therefore he must prove it as part of his case. If I were to decide that the defendant must plead such a matter, the decision would operate as a repeal of the act of Parliament of the 55 Geo. 3, c. 194, s. 21. The 3 & 4 Will. 4, c. 42, s. 1, contains an exception in favour of persons who are empowered by act of Parliament to plead the general issue, and give the special matter in evidence. This proviso clearly shews that the recent statute was not intended to interfere with the right of the defendant to plead the general issue, and give the special matter in evidence under that plea, wherever that right was secured by act of Parliament; and therefore, *à fortiori*, it did not intend to relieve the plaintiff from proving certain matters as part of his case, where an act of Parliament required it to be done. It appears to me, therefore, that the plaintiff would not be entitled to recover without giving such proof as the act of Parliament required, and therefore that the defendant was not bound to plead it. The objection is, in fact, founded on a defect in evidence on the part of the plaintiff, and not on a matter which the defendant ought to have pleaded. The present rule must therefore be discharged.

Rule discharged.

JOHNSON v. WALL.

BUTT shewed cause against a rule obtained by *Hogins*, for taking a sum of 70*l.* out of Court, which had been paid in by the defendant in lieu of bail, pursuant to 7 & 8 Geo. 4, c. 71, s. 2. It was not necessary to go at

A plaintiff is not entitled to receive out of Court, money paid in by a defendant in lieu of bail under the 7 & 8

Geo. 4, c. 71, s. 2, unless judgment has been obtained, or the suit otherwise legally determined.

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length into the facts of the case, because the application might be answered by the statement that the suit was not yet at an end. Several rules had been obtained in the course of the cause, and they were ultimately referred to Master *Leblanc*. After hearing both sides, the Master reported that the cause must proceed. The cause therefore being still in a state of pendency, the plaintiff had no right to take the money out of Court. The words of the act of Parliament were, "in case judgment in the said action shall be given for the plaintiff, he shall be entitled by order of the Court, upon motion made for that purpose, to receive the said money so remaining in or so deposited or paid into the Court as aforesaid, or so much thereof as will be sufficient to satisfy the sum recovered by the judgment and the costs of the application." Unless, therefore, the plaintiff obtain judgment, he had no right whatever to the money which the defendant had paid into Court. Judgment not having been obtained, the present rule must be discharged, and with costs.

Hoggins, in support of the rule, contended, that the reference to the Master, and his report thereon, must be considered as having virtually put an end to the suit; and therefore, within the spirit of the act of Parliament, if not its letter, the plaintiff was entitled to have the money out of Court.

COLERIDGE, J.—It appears to me that the present rule must be discharged. The various rules pending in the suit were referred to the Master, and he has made his report on them. At the same time, however, he has directed that the suit itself must proceed, his report being confined to the rules made in the cause. But I will suppose that he had made his report upon the whole cause. That report might be set aside, and therefore the plaintiff not having judgment, or any thing equivalent to it,

is not entitled to receive the money out of Court. This rule cannot be made absolute, unless the suit has been decided either by judgment or other legal determination. Here, judgment has not been obtained, nor has any decision been pronounced by a person having authority to put an end to the suit; and there was no power given to the Master for that purpose. On the contrary, he directed that the cause should proceed. It appears to me, therefore, that the present rule must be discharged; and, as it is an experiment without a precedent, discharged with costs.

Rule discharged with costs.

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MORRIS v. DAVIES.

MAULE shewed cause against a rule obtained by *Butt*, for setting aside the proceedings to outlawry in this case, on the ground of the original writ of *capias* on which the proceedings were founded being issued into *London* instead of *Montgomeryshire*, of which county the defendant was described, and in which he was resident. It appeared by the affidavits, that the defendant was resident in the county of *Montgomery*, and proceedings to outlawry had been taken against him. It was now sought to set those proceedings aside, because the original *capias* on which the outlawry was founded had been directed to the sheriffs of *London*, but described the defendant as of *Montgomeryshire*. In this course of proceeding the plaintiff had pursued the regular and long-established practice of the Court. He had issued his writ of *capias* into the city of *London*, the venue being in that city, and the writ of *exigi facias* must be directed to the sheriff of the same county or city in which the action is laid; and in *London* the defendant is required from husting to husting, instead of from county court to county court, and a hus-

A writ of *capias* may be issued into a county different from that in which the writ itself describes the defendant as resident; and proceedings to outlawry founded on such a writ are regular.

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ting is held every fortnight. By this means the plaintiff's proceedings were quicker than they would have been, had the defendant been *required* from county court to county court. A writ of foreign proclamation was then issued into the county of *Montgomeryshire*, and the regular proclamations made, in conformity with the provisions of the 31 *Eliz.* c. 3, s. 1. The proceedings were quite regular, therefore, and consistent with the practice in outlawry, as laid down by Mr. *Tidd* (a). It was supposed, that the Uniformity of Process Act had made some difference on this subject. This, however, was not the case. By section 5 of 2 *Will.* 4, c. 39, it was provided, "that, upon the return of *non est inventus* as to any defendant against whom such writ of *capias* shall have been issued, and also upon the return of *non est inventus* and *nulla bona* as to any defendant against whom such writ of *distringas* as hereinafore-mentioned shall have issued, whether such writ of *capias* or *distringas* shall have issued against such defendant only, or against such defendant and any other person or persons, it shall be lawful, until otherwise provided for, to proceed to outlaw or waive such defendant by writs of *exigi facias* and proclamation, and otherwise, in such and the same manner as may now be lawfully done upon the return of *non est inventus* to a *pluries* writ of *capias ad respondendum* issued after an original writ. Provided always, that every such writ of *exigent*, proclamation, and other writ subsequent to the writ of *capias* or *distringas*, shall be made returnable on a day certain in term; and such first writ of *exigent* and proclamation shall bear *teste* on the day of the return of the writ of *capias* or *distringas*, whether such writ be returned in term or in vacation; and every subsequent writ of *exigent* and proclamation shall bear *teste* on the day of the return of the next preceding writ; and no such writ of *capias* or *distringas* shall be sufficient for the purpose of out-

(a) *Prac.* Vol. 1, p. 132, Ed. 9

lawry or waiver, if the same be returned within less than fifteen days after the delivery thereof to the sheriff or other officer to whom the same shall be directed." With the provisions of this section the plaintiff had also complied. Under these circumstances, therefore, the present rule ought to be discharged.

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Butt, in support of the rule, contended, that the proceedings in outlawry were irregular. The *capias* described the defendant as of his real place of residence, according to the form given in the schedule to the uniformity of process act. The defendant resided in *Montgomeryshire*, and therefore the *capias* should have been directed to the sheriff of that county, and issued into it. It was necessary so to describe the defendant as of his actual or last known place of abode in a writ of *capias* issued for ordinary purposes, and there was no reason why a similar course should not be pursued where it was issued as the foundation of proceedings to outlawry. It must have been the intention of the legislature to abolish the fictitious proceeding previously existing of issuing a *capias* into a county in which the plaintiff at the time was perfectly aware the defendant did not reside. Although the statute preserved the mode of proceeding to outlawry subsequent to the *capias*, it must have intended that, so far as the *capias* itself was concerned, the requisites respecting the ordinary writ should be complied with. The proceedings, therefore, should have been in *Montgomeryshire* and not in *London*, and the writ directed to the sheriff of the former county.

Cur. adv. vult.

LITLEDAL, J.—It appears to me that the proceedings here were regular. In the writ of *capias* it is not necessary to describe the defendant's residence exactly; as the use of the description is, to give information to the sheriff, and to point out to him, to the best of the plain-

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tiff's knowledge, where the defendant really is. That is not the case in the writ of summons, which is a serviceable writ. There, it is necessary to describe the defendant's abode correctly, because it is directed to the party himself, and it is important to avoid mistakes as to the identity of the party. The language, also, of the two writs is different. As, then, the description of the defendant is for the information of the sheriff, and the writ may be issued to the sheriff of any county where the defendant is, I think that it was regular to issue this writ into *London*. The fact of his generally residing in *Montgomeryshire*, or his being so described in the writ, makes no difference, because the plaintiff might have received information that the defendant had just arrived in *London*, and he might then sue out his *capias*, directed to the sheriffs of *London*, describing the defendant of *Montgomeryshire*, and the sheriff would be entitled to take him on that writ. I think, therefore, that the present rule must be discharged, but without costs.

Rule discharged, without costs (a).

(a) See *Hill v. Harvey*, ante, p. 163.

BOUGHEY v. WEBB.

A defendant is entitled to his discharge under the 48 *Geo. 3*, c. 123, although he has been out occasionally on day rules during the twelve months.

ARCHBOLD shewed cause, in the first instance, against a rule for discharging a defendant out of custody, under the 48 *Geo. 3*, c. 123, he having remained in execution twelve successive calendar months for a debt not exceeding twenty pounds. The ground of opposition was, that the defendant had been out of custody, both with and without day rules, several times during the twelve months. The affidavits, however, on this point were contradictory.

LITTLEDALE, J.—If he was out of custody on a day rule, that will not interfere with his right to be discharged.

But, if he was out of custody without a day rule, he is not entitled to be discharged under the act. The matter had better be referred to the Master; and as he shall determine on the fact, the defendant will or will not be entitled to his discharge.

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Rule accordingly.

HARRISON and Wife v. ALMOND.

HEATON shewed cause against a rule obtained by *Butt* for staying proceedings in this action until security for costs should be given to the male plaintiff. It was an action for an assault committed on the female plaintiff, brought at her instance, in the name of her husband and herself, without his authority. Both husband and wife were living separate, and the question was, whether, when the injury complained of was committed on the wife alone, the husband was to be permitted, under such circumstances, to interfere and prevent her from obtaining redress against the defendant. Such a course the husband here endeavoured to adopt. He first left his wife quite unprotected, and then, when in consequence of such want of protection she received an injury, he interfered to prevent her from obtaining redress.

Where an action is brought (without the authority of the husband) in the name of husband and wife, for an assault upon the latter, the husband will be entitled to stay the proceedings until he receives an indemnity against costs.

Butt, in support of the rule, was stopped by the Court.

LITLEDALE, J.—The husband is the only person who has any interest in the subject-matter of this action. In case of any damages being recovered, they will be his property, and in case of a nonsuit, he will be liable to the costs of it. It may perhaps be hard in some instances upon the wife, but that is the consequence of the rule of our law. I think, therefore, that the proceedings in the present case must be stayed until an indemnity against

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costs is given to the husband. The Court perhaps might prevent a release by the husband being pleaded, as he would have no right to release the cause of action, the wife's right surviving after her husband's death. The present rule must therefore be made absolute.

Rule absolute.

GLENN v. WILKS.

A plaintiff cannot alter his writ after service; and a notice not to appear to the copy of the writ first served, will not cure the defect.

PETERSDORFF shewed cause against a rule obtained by *Heaton*, to set aside a writ of summons on the ground of irregularity. The irregularity complained of was, that an alteration had been made in the writ after service. From the affidavits, it appeared, that a writ of summons had been sued out, for which a *præcipe* had been given. The writ was then served, and before the defendant appeared another copy of the writ was sued out on the same *præcipe*. Notice was given to the defendant, desiring him not to appear to the first copy served on him. The alteration in question was made in the second copy of the writ. It was to this alteration that the objection was made. It was contended, that the plaintiff had a right to alter his writ at any time previous to appearance of the defendant. With respect to the *præcipe*, that could have no effect upon the plaintiff's proceedings, as it was mere instructions to the officer for drawing up the writ. He cited *Usborne v. Pennell* (a), where the Court of *Common Pleas* had so held it. The present rule ought, therefore, to be discharged. He also cited *Sutherland v. Tubbs* (b), and *Israel v. Middleton* (c).

(a) 2 Dowl. P. C. 801.

(b) 1 Chit. Rep. 320, n.

(c) Id. 319.

Heaton was to have supported the rule.

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LITLEDALE, J.—The plaintiff cannot alter his writ after service. Here, the writ was served on the defendant, and then the same writ was served again in an altered state. The fact of giving notice to the defendant not to appear, makes no difference. The plaintiff ought to have issued a fresh writ. The present rule must therefore be made absolute, but without costs.

Rule absolute, without costs.

COURT OF COMMON PLEAS.

Michaelmas Term,

IN THE SIXTH YEAR OF THE REIGN OF WILLIAM IV.

1835.

SHARPE v. JOHNSON.

A prisoner defendant need not comply with 1 Reg. Gen. H. T. 2 Will. 4, s. 5, by stating his residence in an affidavit.

The Chief Justice's clerk's list of commissioners is conclusive evidence as to whether a particular person is a commissioner of the English Court of C. P. pursuant to the 3 & 4 Will. 4, c. 42, s. 42, for taking affidavits.

Two months' delay in taking the objection to the affidavit of debt, that it is not sworn before such a commissioner, is not a waiver of it.

HURLSTONE moved for a rule to shew cause why the defendant should not be discharged out of the custody of the warden of the *Fleet*, on entering a common appearance. The defendant had been arrested for 500*l.*, the amount of a bill of exchange, upon an affidavit sworn in *Ireland*, the *jurat* of which was as follows:—

“ Sworn at *Athlone*, in the county of *Roscommon*, the day of , 1835, before me, a commissioner for taking affidavits for the Court of Common Pleas in the said county—*John Gaynor*.”

In support of the motion reference was made to the 3 & 4 Will. 4, c. 42, s. 42, which gave to the Judges the same power of appointing commissioners for taking affidavits in *Scotland* and *Ireland* as they before possessed for granting commissions for the different counties of *England* and *Wales*; and it was contended, that, if Mr. *Gaynor* were a commissioner appointed under the provisions of that act, it ought to have been stated in the *jurat* that he was a commissioner. *Howard v. Brown* (a). There was an affidavit of the defendant's attorney, by which it appeared that he had requested the clerk of the Chief

(a) 1 M. & P. 22; 4 Bingh. 393, S. C.

Justice to examine his list of commissioners, and that the name of *Gaynor* was not found there. It also appeared from another affidavit that the defendant's attorney had addressed a letter to Mr. *Gaynor* at *Athlone*, requesting to know if he were a commissioner for taking affidavits in the courts in *England*; and, in reply, a letter was received, bearing the post-mark of *Athlone*, and signed *John Gaynor*:—"Sir, in answer to your letter, I beg to state that there is not any commissioner at *Athlone* for taking affidavits in the *English* Courts. P. S. I am a commissioner for taking affidavits in all the *Irish* courts." There was also an affidavit of the defendant, which stated that he had obtained a day rule, and had seen at the filazer's office the affidavit of debt upon which he had been arrested, and also the above-mentioned letter signed *John Gaynor*, and that the signature to both was the same hand-writing. It was submitted that this was sufficient evidence to shew that Mr. *Gaynor* was not a commissioner; and that therefore the signature to the *jurat* should have been verified by an affidavit made in this country; and Mr. *Gaynor's* authority to administer oaths and take affidavits should have been verified in the like manner. *French v. Bellew* and *Another (a)*, and *Nealy v. Newell (b)*.

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W. H. Watson shewed cause, and took a preliminary objection that the affidavit of the defendant did not state his place of abode, according to the direction of the *Reg. Gen. H. T. 2 Will. 4, s. 5 (c)*, which requires that the addition of every person making an affidavit shall be inserted therein.

TINDAL, C. J.—The object of that rule was to make the opposite party acquainted with the residence of the

(a) 1 M. & Sel. 302.

(b) 8 East, 364.

(c) Ante, Vol. 1, p. 184; and

see *Johnson v. Chard*, ante, Vol. 2, p. 469.

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deponent; but I am of opinion that it does not apply to the case of a prisoner. He is in effect on the floor of the Court, and it would be absurd to require him to state his residence, when the plaintiff, by opposing his discharge, must know where he is.

W. H. Watson then referred to *Kilby v. Stanton* (a), and *Ellis v. Sinclair* (b), in which cases the Court of *Exchequer* had allowed affidavits sworn before a commissioner of the Court of *Exchequer* in *Ireland*, or a magistrate in *Scotland*, to be read. He also produced an affidavit, by which it appeared that the defendant had been arrested two months before any step had been taken to obtain his discharge; and he cited *Reg. Gen. H. T. 2 Will. 4, s. 33* (c), by which "it is ordered that no application to set aside process or proceedings for irregularity shall be allowed, unless made within a reasonable time (d)."

Wilde, Serjt., and *Hurlstone*, in reply, were stopped by the Court.

TINDAL, C. J.—The only question here is, whether Mr. *Gaynor*, before whom this affidavit is sworn, is a commissioner appointed under the provisions of the 3 & 4 *Will. 4*, c. 42, s. 42. I have obtained from my clerk his list of the persons appointed, and I do not find the name of *Gaynor* among them. The rule must therefore be made absolute.

The rest of the Court concurred.

Rule absolute.

(a) 2 Y. & J. 75.

(b) 3 Y. & J. 273.

(c) Ante, Vol. 1, p. 187.

(d) See *Hanson v. Shakelton*, ante, p. 48.

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BALL v. STAFFORD.

J. BAYLEY moved for leave to plead a payment of money into Court, without paying in the money. A *capias* had issued against defendant, indorsed for bail for 200*l.*, and that sum was deposited in lieu of bail, together with 10*l.* costs. It was afterwards paid into Court, together with 10*l.* additional, to abide the event of the suit. It appeared from affidavits that only 81*l.* 14*s.* was due, which the defendant was desirous of pleading as paid into Court.

Where the sum indorsed on the writ of *capias* had been deposited in lieu of bail, the Court refused to permit the defendant to plead payment into Court of a less sum without paying in the money.

THE COURT, upon the authority of *Stultz v. Heneage* (a), where it was held that money paid into Court in lieu of bail cannot be in part appropriated to the purposes of a plea of *tender*—

Refused the rule.

(a) 4 M. & Scott, 472.

ATKINSON and Others v. DUCKHAM and Others.

BUTT moved for leave to withdraw two pleas, and replead them together with a plea denying the bankruptcy. The action was brought by the assignees of a bankrupt, for goods supplied by him; and it was proposed to plead, 1st, a denial of the bankruptcy, 2ndly, a mutual credit between the defendant and the bankrupt, upon which only a small sum was due; and, lastly, payment of the sum due into Court. A Judge at chambers had refused to allow the plea denying the bankruptcy; but from something which had transpired at the last *Worcester* assizes, it appeared the question of bankruptcy was very doubtful.

In an action by the assignees of a bankrupt, the Court will allow the bankruptcy to be put in issue if the fact be doubtful, along with a plea of mutual credit and payment into Court.

The rule is absolute in the first instance.

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v.

DUCKHAM.

TINDAL, C. J.—As there is some doubt as to the fact of the bankruptcy, you may take a rule.

Butt asked if the rule was to be *nisi*, or absolute in the first instance?

TINDAL, C. J.—I think it may be absolute in the first instance.

Rule absolute.

KNIGHT'S Bail.

After bail are sworn, it is too late to object that the costs of a former unsuccessful attempt to justify are not deposited.

THOMAS opposed bail. After the bail were sworn, he objected to their justification, unless the costs of a former unsuccessful attempt to justify were paid or deposited (*a*).

PARK, J.—It is now too late to take that objection; it should have been made before the bail were sworn.

Thomas afterwards mentioned the case to the full Court.

PER CURIAM.—It is an inflexible rule in this Court that the costs of a former unsuccessful attempt to justify should be required to be deposited before the bail are sworn.

(*a*) See *Pasmore's Bail*, ante, Vol. 3. p. 214.

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FIFE v. BRUERE.

WILDE, Serjt., shewed cause against a rule obtained by *Humfrey* for setting aside a judgment by default on an affidavit of merits. The action was brought on a bill of exchange for 300*l.*; and it appeared that the defendant, who was a prisoner, had received value to a very trifling amount. The time for pleading expired on the 18th of *June*, but the plaintiff did not sign judgment until the 24th of *June*. On the 4th of *November*, a rule to compute principal and interest on the bill was served upon the defendant; and, on the 10th of *November*, a rule *nisi* was obtained for setting aside the judgment. It was submitted, that, under these circumstances, the application came too late; the fact of the defendant being a prisoner made no difference in this respect. *Primrose v. Baddeley* (a).

The rule, that an application to set aside a judgment by default on affidavit of merits must be made within a reasonable time, applies as well to a prisoner as other persons.

TINDAL, C. J.—It appears that this is a regular judgment, and I know of no instance in which an application has been made so late as this. The rule must be discharged.

Rule discharged, with costs.

(a) *Ante*, Vol. 2, p. 360.

 PILCHER v. WOODS.

STAMMERS moved to make a judge's order a rule of Court, and also for an attachment against the Sheriff for not bringing in the body. It was suggested, that in the other Courts but one motion was required for both purposes. *Hinchcliffe v. Jones* (a); *Howell v. Bulteel* (b).

In the C. P. two motions are necessary to make a judge's order a rule of Court, and for an attachment for disobedience thereto.

GASELEE, J.—The practice in this Court has always

(a) *Ante*, Vol. 4, p. 86.

(b) *Ante*, Vol. 3, p. 99.

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WOODS.

been, to make two separate motions, and I am of opinion they are still necessary.

Rule, accordingly (a).

(a) See *Staniland and others v. Ogle*, ante, Vol. 3, p. 97.

ENGLER (Administrator of STULTZ) v. TWISDEN, Bart.

The Court will not exempt executors, plaintiffs, from payment of costs, unless it appears that they have made due inquiries and exercised a proper caution before bringing the action.

A RULE *nisi* had been obtained for entering up judgment for the defendant, without costs. The action was brought by the plaintiff, as administrator, on a bond executed in the year 1813; the defendant pleaded that he was discharged under the Insolvent Debtors' Act. It was proved upon the trial that the defendant, in the year 1818, applied to the Court for the Relief of Insolvent Debtors for his discharge from prison. The records of the Court at that period were in a very imperfect state, owing to one of the principal officers of the Court having absconded. The schedule of the defendant was produced, in which the intestate was named as a creditor; this schedule was indorsed, "Petition dismissed, with leave to make another application." An amended schedule, which also contained the intestate's name, was indorsed with the name and address of the defendant's attorney. And, in a public book of minutes belonging to the Court, the letter "D" was marked opposite to defendant's name, with the words "Last Schedule." The bond was found with a paper attached to it, intimating the defendant's intention to apply to the Insolvent Debtors' Court.

Talfourd, Serjt., shewed cause.—The effect of the 3 & 4 Will. 4, c. 42, s. 31, has been, to place executors, plaintiffs, in the same situation as to costs as other plaintiffs, unless there appears to the Court some reason to exercise its discretion in their favour. The mere circumstance of

an action having been properly brought, has been held not sufficient, but it ought to appear that the plaintiff was induced to bring it by something like fraud or misrepresentation on the part of the defendant. *Southgate v. Crawley* (a). The case of *Lysons v. Barrow* (b) only decides that the Court will order judgment to be entered up without costs, where there appears a reasonable or probable cause for suing in the representative character. Here, the plaintiff has proceeded without the slightest caution; for, if he had applied to the defendant's attorney, he might have easily ascertained that the defendant was discharged.

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Sir *W. Follett*, in support of the rule.—The circumstances of the case are sufficient to induce the Court to relieve the plaintiff from the payment of costs. From the documents of the Insolvent Court, he might reasonably suppose the defendant had not been discharged. On the schedule was indorsed, that the petition was dismissed. In *Southgate v. Crawley*, the plaintiff could easily have ascertained that there was some express contract between the parties, and that nothing was due. And it is evident, from the case of *Lysons v. Barrow*, that the Court will not compel an executor to pay costs, where he has acted *bond fide* in the discharge of his duty.

TINDAL, C. J.—The effect of the 3 & 4 Will. 4, c. 42, has been, to place executors, plaintiffs, on the same footing as other plaintiffs, but with this exception, that they may apply to the discretion of the Court under particular circumstances. In this case, no hardship will attach to the plaintiffs, for if they have exercised a just judgment the costs will not fall on them, but on the estate of the intestate. Executors ought to stand on the same footing as

(a) 1 Scott, 374.

(b) 4 Moore & Scott, 463.

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other plaintiffs, unless the circumstances of the case make it reasonable that it should be otherwise; and is there in this case enough to call upon us to say this executor should be in a different situation? The case of *Lysons v. Barrow* has, in my opinion, been decided somewhat too favourably for executors, plaintiffs; and it seems to me, that, unless it clearly appears that the defendant has, by his own act, brought the action upon himself, the plaintiff should stand in the same position as any other person. So far from the present defendant misleading the plaintiff, the latter has not used that care and caution which he ought in bringing the action. The action is on a bond more than twenty years old, and upon which no interest has been paid since the year 1818. The bond was found with a notice attached to it, intimating the intention of the defendant in that year to apply to the Insolvent Court for his discharge. A schedule was produced, not indeed on which there appeared his ultimate discharge, but on which there was a pencil-mark of the letter "D." The plaintiff should, under these circumstances, before he brought the action, have made inquiries of some person connected with the defendant, as to whether or no he was discharged.

PARK, J.—The act of Parliament has vested in the Court a discretion to exempt executors, plaintiffs, from the payment of costs. The question is, whether the circumstances in the present case are sufficient to call upon the Court to exercise that discretion. In my opinion, the circumstances are strong to shew that the plaintiff did not use due diligence. The lapse of twenty-two years from the date of the bond would have led a prudent and sensible person to make some inquiry of the defendant's attorney respecting the indorsement on the schedule. I will not say whether the case of *Lysons v. Barrow* has been decided too strongly for executors; but in that case

there were grounds for the exemption. I agree with the judgment in *Southgate v. Crawly*, which is against the present application.

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GASELEE, J.—It appeared at the trial, that, when the parties made inquiries at the office, they were informed it was understood the defendant had been discharged; the plaintiff should therefore have made further inquiry.

Rule discharged, without costs.

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SLANDER.—The declaration commenced with the usual inducement of plaintiff's good character, and then stated that the plaintiff, at the time of committing the grievances, was a draper, haberdasher, and laceman; that he had never been in embarrassed or insolvent circumstances, in the way of his said trade and business, or imprisoned, or a person unfit to be credited in the way of his said trade and business. But the defendant, contriving to injure him in the way of his said trade and business, in a certain discourse which the defendant then had concerning the plaintiff, and concerning him in the way of his said trade and business, in the presence and hearing of divers subjects of this realm, then in the presence and hearing of those subjects, falsely and maliciously spoke and published concerning the plaintiff, and concerning him in the way of his said trade and business, the words following, "I do not do business with him in the way of his trade and business, nor will I, as he is a queer character, and has been deeply involved in debt, and in several prisons." Special damage, that one *W. W. Wreford*, and certain other persons named, who had been used and accustomed to deal with the plaintiff in his said trade and business, and to supply him with divers large quantities of goods, for

To an action of slander imputing insolvency to plaintiff, the defendant pleaded that J. W., having occasion in the way of his trade and business to inquire into the solvency and state of affairs of the plaintiff, sent one W. W. to the defendant for that purpose, and that defendant then spoke the words in the declaration, believing them to be true:—*Held* bad on special demurrer, as it did not state the words to be spoken *without malice*, or at least *bona fide*. When words are actionable in themselves, a traverse of the special damage is immaterial and improper.

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carrying on his said trade and business, upon credit, to the great profit and advantage of the plaintiff, have from thence hitherto refused to supply him upon credit with goods as formerly.—The defendant pleaded, *First*, not guilty. *Secondly*, that before, and at the time of the speaking and publishing the several words, and each of them, the defendant was a linen merchant, and the trade and business of a linen merchant, during all that time, exercised and carried on. That the said *J. Wreford*, in the declaration mentioned, was a hosier and haberdasher, and the trade and business of a hosier and haberdasher exercised and carried on. That the said *J. Wreford*, being desirous of inquiring and learning, and having occasion to inquire and learn, in the way of his said trade and business, into the solvency and state of affairs of the plaintiff, and believing that the defendant could then afford him information as to such solvency and state of affairs, did then, to wit, on the day and year in the declaration mentioned, send one *W. Wreford*, the nephew of the said *J. Wreford*, and the agent of the said *J. Wreford* for that purpose, to inquire into, and learn of and from the defendant, the solvency and state of affairs of the plaintiff; and he thereupon inquired of the defendant as to the solvency and state of affairs of the plaintiff, by the said *W. Wreford*, as such agent as aforesaid of the said *J. Wreford*, in the way of his said trade and business; and that the defendant, in answer to such inquiries, spoke and published to the said *W. Wreford*, as such agent as aforesaid, the said several words in the said declaration mentioned, as he lawfully might, the same then being a confidential communication by the defendant to the said *W. Wreford*, as such agent as aforesaid; he, the defendant, at the time of speaking and publishing the said words, firmly believing the same and each of them to be true, which is the same speaking, &c.; concluding with a verification. *Thirdly*, to the special damage by the plaintiff alleged to have been sustained on account of the refusal of the several persons in the declaration

mentioned to continue to supply the plaintiff on credit, the defendant says, that the said *J. Wreford*, and the several other persons, did not, nor did any or either of them, by means of the committing of the said grievance by the defendant, refuse to continue to supply him upon credit with goods as in the declaration alleged.

Demurrer to second plea, assigning for causes, that the matters pleaded were no bar, if the words were spoken maliciously; and therefore the plea, if it admits the malice, is bad; if it deny the malice, it is argumentative, and amounts to the general issue, and, as being in denial, should conclude to the country; also that the said plea does not sufficiently deny the grievances or confess and avoid them; also that the plea takes away from the consideration of the jury the question of malice, although malice is either the gist of the action, or a substantive part of the action; also that the plea amounts to a plea of not guilty; also, although the plea professes to answer the whole declaration, it only justifies the speaking and publishing to one person, although the defendant has charged the speaking and publishing the words in the presence and hearing of divers persons; also that the plea shews no necessity for publishing the words in the presence of divers persons, when the occasion stated in the plea only required the defendant to speak the words to one person alone; also that the said plea ought to have shewn some reason why the defendant believed the words to be true; also that the plea ought to shew what occasion the said *J. Wreford* had to inquire into the solvency and state of the plaintiff, that the Court might see whether it was a lawful occasion; at all events, the plea ought to state the occasion to be lawful.

Demurrer to third plea, that special damage is not the gist of the action, nor traversable, and that a defendant cannot plead a plea to damage alone, the damage not being by itself a cause of action, or divisible from the rest

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of the grievances; also that the said plea does not sufficiently point out what it is, to which it is intended to be pleaded.

Talfourd, Serjt., in support of the demurrers.—The second plea is bad, on three grounds; *first*, that it amounts to the general issue; *secondly*, because it does not confess or avoid the matter charged in the declaration; and *thirdly*, it professes to answer the whole declaration, when it answers part only. In an action of slander, the malicious speaking is a necessary allegation in the declaration. In the case of *Smith v. Spooner* (a), which was an action for slander of title, *Mansfield*, C. J., in delivering judgment, says, "it is objected, that, supposing this was a case where the claim of title in the defendant might be a ground of defence, yet he could not give it in evidence under the plea of the general issue; that, however, is directly opposite to the case of *Hargrave v. Le Breton* (b), where the general issue was pleaded; but according to common sense it cannot be necessary to plead specially: he alleges that the defendant has slandered his title maliciously; if he had no title, he had nothing to be slandered; the slander must also be malicious, and what proof of malice is there?" Where a defence involves a denial, in point of fact, of some matter of fact contained in the declaration, then the defendant is not entitled to plead the matter specially. If the words are true, that would be a good defence, by way of confession and avoidance; but the defence here set up is that of a confidential communication, and therefore the plaintiff is bound in the first instance to prove direct malice. The principle laid down in the case of *M'Pherson v. Daniels* (c), is applicable to the present case. There *Littledale*, J., says, "the declaration which contains a technical state-

(a) 3 Taunt. 247.

(b) 4 Burr. 2422.

(c) 5 Man. & Ry. 251; 10 B.

& C. 203.

ment of the facts necessary to support the action, alleges that the defendant falsely and maliciously published the slander to the plaintiff's damage. In order to maintain such an action, there must be malice in the defendant, and a damage to the plaintiff. Where the words falsely and maliciously spoken are actionable in themselves, the law *prima facie* presumes a consequent damage without proof; in other cases, actual damage must be proved. It is competent to the defendant upon the general issue, to shew that the words were not spoken maliciously, by proving that they were spoken upon an occasion or under circumstances which the law, on the ground of public policy, allows, as in the case of a parliamentary or judicial proceeding, or in giving the character of a servant. But if the defendant relies upon the truth as an answer to the action, he must plead the matter specially." Since, therefore, malice is a necessary ingredient in an action of slander, the second plea, by disclosing facts which rebut the legal presumption of malice, clearly amounts to the general issue, and is therefore bad. *Com. Dig. Pleader* (E 14). In the case of *Carr v. Hinchcliff* (a), matter was pleaded which might have been given in evidence under the general issue, but there, the plea confessed and avoided the plaintiff's cause of action. In the present case it is a necessary part of the plaintiff's cause of action, that the words are spoken maliciously, which the plea denies. The new rules have made no difference in this respect; the plea of not guilty, in an action of slander, operates in denial of speaking the words, of speaking them maliciously and in the sense imputed. *R. H. T. 4 Will. 4, r. 4(b)*. The plea is also bad, as it professes to answer the whole declaration, when it answers only a part. The declaration charges the speaking the slanderous words before a number of persons; and it is no answer to shew an occasion of speaking to one person.

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(a) 7 Dowl. & Ry. 42; 4 B. & C. 547. (b) See ante, Vol. 2, p. 325.

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The third plea is also bad, since the special damage is not the gist of the action.

Storks, Serjt., contra.—The second plea does not amount to the general issue. It is not absolutely necessary to allege in the declaration, that the words were maliciously spoken; it is sufficient if they are stated to be wrongfully uttered, for the law will infer malice from the publication of the slanderous matter, the act being of itself wrongful. *Bromage v. Prosser* (a), *Drewe v. Coulton* (b). It by no means follows, because the matter stated in the second plea might have been given in evidence under the general issue, that it cannot be pleaded specially. In the case of *Lake v. King* (c), it is stated, that where the words are spoken, not in the malicious sense imputed by the declaration, but in an innocent sense, or upon an occasion that warranted the publication, this matter may be given in evidence under the general issue, because it proves that the defendant is not guilty of the malicious slander charged in the declaration; or the defendant may plead these matters, for a defendant shall never be put to the general issue when he confesses the words, and justifies them, or confesses the words, and by special matter shews that they are not actionable, 4 Rep. 14, *Lord Cromwell's case*; but it seems more usual now to give them in evidence under the general issue. It is also evident, from the case of *Carr v. Hinchcliff*, that a defence, which amounts to the general issue, may, nevertheless, be pleaded. The plea, in fact, answers the whole declaration. The matter disclosed shews that the words were spoken on an innocent occasion; and if the plaintiff meant to rely upon the words having been spoken in the presence of other parties, he should have new assigned that fact. In trespass, if a defendant justifies an entering, and staying twenty-four hours, when the declaration charges a staying three

(a) 6 Dowl. & Ry. 296; 4 B. & C. 247.

(b) 1 East, 563.

(c) 1 Wm. Saund. 130, n. 1.

weeks, the plea covers the whole, and the defendant must new assign if he relies upon the excess. *Monprivatt v. Smith* (a). So, in trespass for breaking and entering the plaintiff's dwelling-house, and expelling him therefrom, a justification as to the breaking and entering will cover the whole declaration. *Taylor v. Cole* (b).

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The Court having intimated a strong opinion that the third plea could not be supported, the argument on that point was abandoned.

Talfourd, in reply, contended that the question was not whether the slanderous matter uttered by the defendant was true, or whether he believed it to be true; but whether it was spoken on a lawful occasion, *bond fide*, and without malice.

Cur. adv. vult.

The judgment of the Court was now delivered by—

TINDAL, C. J.—The argument in this case has turned principally on the special demurrer to the second plea; for as to the third plea, which is pleaded not to the action but to the special damage only, we held it to be insufficient, as the argument was proceeding before us. The allegation of special damage in a declaration of slander is intended only as a notice to the defendant in order to prevent his being taken by surprise at the trial. Where the words are actionable in themselves, it is not the *gist* of the action, but the consequence only of the right of action. If the plaintiff proves his special damage, he may recover it; if he fails in proving it, he may still resort to and recover his general damages. The traverse, therefore, of such an allegation is immaterial and improper, as a finding upon it either way will have no effect as to the right to the verdict.

To the second plea the plaintiff has assigned several

(a) 2 Camp. 175.

(b) 3 T. R. 292.

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causes of special demurrer. The two points, however, which have been relied on in the argument before us are these:—*First*, that the plea amounts to the general issue, and is, on that account, bad; and *secondly*, that the defendant has not, by the allegations in his plea, sufficiently negatived that the speaking the words was accompanied with malice in fact, so as to constitute a legal answer to the action. It is unnecessary to give any opinion on the first objection, because upon the ground of the second we think the plea is insufficient in law. The ground of defence intended to be set up by the defendant is, that the words were spoken on an occasion in which the exigencies of society demand there should be an unlimited right to make inquiries on the one hand, and an unlimited freedom to communicate on the other; such communication being made without any malice against the plaintiff. There can be no doubt, that where such occasion occurs, and there is in the making the communication an absence of express malice, or malice in fact, the law holds the communication to be innocent, and gives no right of action to the plaintiff. In order, however, to constitute such a defence in any case, both circumstances must be found to concur; and, after the just occasion for the communication has appeared in proof, the issue must depend upon the existence or absence of express malice against the plaintiffs. The question, therefore, upon the present plea is, whether it states with sufficient certainty both the circumstances above mentioned.—So far as relates to the occasion of publishing the libel, the statement in the plea appears to us to be free from any sound objection. The publication is alleged to have taken place in the course of a confidential communication between one tradesman and another, as to the solvency of a third person, whom the inquirer was about to trust. If such communications are not protected by the law from the danger of vexatious litigation in cases where they turn out to be incorrect in fact, the stability of men engaged in trade and commerce would be exposed to the

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greatest hazard, for no man would answer an inquiry as to the solvency of another. But then comes the question as to the other fact, which is essential to complete the defence: was the communication made without any malice against the plaintiff? We think the plea is defective in respect to its allegation on this point. The plea neither expressly denies malice, nor states the publication to have been made honestly, or *bond fide*, which might have amounted to an implied denial of malice. All that it alleges is, that the defendant firmly believed the words spoken to be true. Now this is a denial of *one* ground upon which malice in fact might be presumed against the plaintiff, but of one only. If the plaintiff could shew that the defendant had uttered the words, and had not believed them to be true at the time he uttered them, it would, undoubtedly, be conclusive evidence of the defendant's malice against the plaintiff. The allegation, therefore, in the plea, that the defendant did believe the words to be true, negatives undoubtedly that single ground of malice, but no more. The communication, however, may have been malicious on various other grounds. Direct malice against the plaintiff may have gone far in producing the defendant's belief. Consistently with the allegation in his plea, the defendant may have sought out the occasion of hearing the slander of the plaintiff, and again the subsequent occasions of making the communication. These and other grounds of maliciously speaking the words will be excluded by an express denial of malice, or an allegation that the words were spoken honestly, and *bond fide*. But we think the absence of malice in fact against the plaintiff does not appear with sufficient certainty on the face of this plea; and for want of an express or implied denial of it, we hold the plea to be bad, and that there must be judgment for the plaintiff on the second and third pleas.

Judgment accordingly.

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OSBORNE v. ANGLE.

Where a warrant on a charge of felony is lodged with the warden against a prisoner in his custody for debt, he is authorized in confining him in the strong-room, and the Court will not summarily relieve him from his close confinement.

KELLY moved for a rule calling on the Warden of the *Fleet* prison to shew cause why the defendant should not be removed from the strong-room of the prison in which he was then confined, and allowed to occupy the interior of the prison, in common with the other prisoners. The affidavit in support of the motion stated, that the defendant had been arrested for debt on the 6th of *November*, and detainers had been subsequently lodged against him. He continued to occupy the interior of the prison until the 17th of *November*, when a warrant was sent to the prison, directed to the Warden, and purporting to be issued by the Lord Mayor, requiring the Warden to keep the defendant in close custody, as he had been charged before the Lord Mayor with forging the acceptance of a bill of exchange. Upon the receipt of this warrant the Warden took no measures to bring the defendant before the Lord Mayor, but removed him from the part of the prison he before occupied to the strong-room. The affidavit further stated, that the defendant was innocent of the offence, but that the Warden refused to release him from the strong-room, unless he entered into a bond for security.

Wilde, Serjt., shewed cause, and contended that the defendant being under a criminal charge, a closer custody was necessary than in the case of ordinary debtors, as he had a stronger inducement to make his escape. The 4 Geo. 4, c. 64, s. 4, rule 6, expressly requires that there shall be a classification of prisoners within gaols, and that debtors shall not be permitted to associate with persons in custody on criminal charges. The other debtors would naturally feel a degradation in being in the same place as persons charged with felony. Besides, the

rule of Court of *H. T. 3 Geo. 2*, directs the Warden to make a strong-room for the safe custody of all persons endeavouring to make their escape, and also for such as are guilty of any felony or misdemeanor, that the liberty of the other prisoners may not be restrained.

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Kelly, and *Humfrey*, in reply, contended that the rule of Court was not applicable to the present case. The purposes for which the strong-room was made are distinctly specified: *first*, for all persons endeavouring to make their escape; and, *secondly*, for such as are guilty of any misdemeanor. But a charge has been made against the defendant, which he swears is totally unfounded. The leaving a copy of the warrant at the prison gives no power to the Warden to confine him; and it would be a great hardship on the defendant to put him to an expense beyond his means in suing out a writ of *habeas*.

TINDAL, C. J.—This Court would at all times be ready to interfere if any unnecessary severity was exercised towards a prisoner; but in the present instance it appears to me that no more has been done than was necessary for the safe custody of the defendant, and the liberty and enjoyment of the other prisoners. The strong-room has been made under a rule of this Court, and we find, from the evidence of the officer whose duty it is from time to time to be in the room, that it is commodious and dry. The rule directs the room to be made for persons endeavouring to make their escape; and the question is, whether the Warden is bound to wait until the party has actually attempted his escape, or whether there is such a state of circumstances, that the party is willing to escape if no restraint be put upon him. In the present case, the warrant charges him with felony. That is not a mere idle charge; it must have been founded upon depositions taken on oath before the magistrate who granted the warrant. The con-

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sequence is, that a person with such a charge hanging over him, stands in a different situation from the other debtors, and is naturally more desirous of escaping. If the defendant were allowed to be set at liberty, it would be necessary at least that there should be some person to watch him all day, and it certainly would not be right that persons visiting the prison should be admitted with the same ease as under other circumstances. It seems to me, therefore, that this case falls within the rule of Court, and we feel the less necessity for interfering, when the defendant might have brought the matter to a speedy termination by suing out a writ of *habeas*, and going before a magistrate to be examined on the charge.

PARK, J.—It is admitted, that no unnecessary harshness has been used towards this prisoner. Much stress has been laid on the mere words of the rule of Court; but when the words “guilty of a misdemeanor” are used, it does not apply merely to persons convicted. I think the defendant should have given notice of this rule to the prosecutor, who then might have given some directions, which would have put an end to this application. It would be improper to place a person charged with felony among other prisoners, who are often merely reduced by the calamities incident to persons in trade.

GASELEE, J.—I am also of opinion, that this is a case which falls within the rule of Court. Where there is a person whose escape is attended with more serious consequences than the others, the Warden is bound to exercise more care with him than with persons in a different situation.

Rule discharged (a).

(a) *Bosanquet*, J., was absent.

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JOHNSON v. KENNEDY.

HURLSTONE moved for a rule to shew cause why the order of Mr. Justice *Patteson*, made in this cause, should not be rescinded, and why the defendant should not be discharged out of the custody of the Warden of the *Fleet*, on entering a common appearance. The affidavit of debt, which was sworn before a *Scotch* magistrate, was as follows:—"William Johnson, of the town of *Girvan*, in the county of *Ayr*, in *Scotland*, writer and bank agent, maketh oath and saith, that *David Dalton Kennedy*, proprietor of the estate of *Craig*, in the county of *Ayr* aforesaid, now or formerly residing in *London*, is justly and truly indebted unto him, this deponent, on open account, and by virtue of a certain promissory note granted by the said *David Dalton Kennedy* to this deponent, payable to this deponent, or to his order, at a day now past, in the sum of five hundred and fifteen pounds, five shillings, and eleven-pence halfpenny sterling, for money lent and advanced by this deponent to the said *David Dalton Kennedy*, and on his behalf, and at his request, and also for factor fee, trouble, and commission, as factor and land steward to the said *David Dalton Kennedy*. And this deponent further saith, that no offer hath been made to pay the said sum of five hundred and fifteen pounds, five shillings, and eleven-pence halfpenny sterling, or any part thereof, in any note or notes of the Governor and Company of the Bank of *England*, expressed to be payable on demand." The magistrate's signature to the jurat, and his authority to administer oaths were duly verified by affidavit. An order of Mr. Justice *Patteson* had been obtained for holding the defendant to bail on the above af-

In order to rescind a Judge's order, the proper course is to apply to the Court: therefore, where a writ of detainer issued under a Judge's order, and was lodged at the prison on the 22nd of October, and on the 30th a summons was taken out at chambers, returnable on the following day, to discharge the defendant out of custody, on account of the insufficiency of the affidavit to hold to bail, which summons was dismissed; it was held not too late to apply to the Court on the first day of term, to rescind the Judge's order and discharge the defendant out of custody, on account of the insufficiency of the affidavit, and irregularity in the writ.

Semble, where a summons is taken out at chambers on the eighth day after the arrest, to discharge the defendant out of

custody, on account of a defect in the affidavit to hold to bail, which summons is returnable the following day, the application is not too late, unless it appears on what part of the day the defendant was arrested.

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fidavit; and on the 22nd of *October*, a detainer was lodged against the defendant, who was then a prisoner in the *Fleet*. On the 30th of *October*, a summons, returnable on the following day, was taken out at chambers before Mr. Justice *Williams*, to discharge the defendant out of custody, on account of the insufficiency of the affidavit to hold to bail, but the learned Judge refused the application. The present motion was made, not only on account of the insufficiency of the affidavit, but also, that the writ of detainer omitted to state the date of the Judge's order by which the defendant had been holden to bail, as required by the 2 *Will.* 4, c. 39, s. 8. A rule *nisi* having been obtained,

Busby shewed cause, and admitted that the affidavit to hold to bail and writ were bad, but contended, that the application came too late. The rule *H. T. 2 Will.* 4, s. 33(a), requires that an application to set aside process for irregularity should be made within a reasonable time. Here the summons was not taken out at chambers until the eighth day, and was returnable the following day. In *Tyler v. Green* (b), the writ was served on the 25th of *October*, and the application to set aside the service was made on the 3rd of *November*, the 2nd being a *Sunday*; the Court of *Exchequer* held, that it ought to have been made on the 1st.

TINDAL, C. J.—It does not appear at what time on the 22nd the detainer was lodged at the prison; it might have been in the evening. Now are we to look to the fractional part of a day? Besides, the objection to the writ is clearly too late, for no mention of it was made at chambers.

Hurlstone, *contra*, contended, that as the writ had

(a) Ante, Vol. 1, p. 187.

(b) Ante, Vol. 3, p. 439.

issued under a Judge's order, the proper course was to come to the Court, and not to apply at chambers to one Judge, to rescind the order of another. The application was made the first day of term.

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TINDAL, C. J.—I think the defendant has taken the proper course in coming to the Court. The rule must therefore be made absolute.

PARK, J.—Whenever an application is made to me at chambers, to rescind the order of another Judge, I always refuse it. The proper course is to apply to the Court.

The rest of the Court concurred.

Rule absolute.

— *See Willm v. Jones. 21. 11. 1835.*

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11. 2. 1835. 11. 11. 1835.

ASSUMPSIT, for use and occupation. Plea, *non assumpsit*. At the trial before the Sheriff of *Middlesex*, it was proved that the defendant held the premises of the plaintiff under a written agreement; that, some previous rent not having been paid, the plaintiff distrained on the defendant's goods, and that the defendant had given the plaintiff bills of exchange in satisfaction of that rent. On the part of the defendant evidence was offered, that the plaintiff had mortgaged the premises, and that the mortgagee had given the defendant notice to pay him the rent. It was objected, that this evidence could not be received under the plea of *non assumpsit*, but should be pleaded specially. The Sheriff refused to receive the evidence, and the jury found a verdict for the plaintiff.

In an action for use and occupation, the fact of the mortgagee of the premises having given the defendant notice to pay the rent to him, may be given in evidence under the general issue, if the rent sought to be recovered accrued due after the notice; but if the rent accrued due before the notice, this defence must be specially pleaded.

Bompas, Serjt., having on a former day obtained a rule

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to enter a nonsuit, on the ground that the evidence ought to have been received—

Busby shewed cause, and relied on *R. H. T. 4 Will. 4*, which declares, that in all actions of *assumpsit*, the plea of *non assumpsit* shall operate only as a denial in fact of the express contract or promise alleged, or of matters of fact from which the contract or promise alleged may be implied by law.

Cur. adv. vult.

TINDAL, C. J.—The only question in this case is, whether, consistently with the new rules, the defence intended to be set up can be given in evidence under the general issue. It does not appear whether the money claimed to be due for the use and occupation became due from the defendant before or after the notice given by the mortgagee to pay the rent to him. Part may have been due before the notice, and part may have become due after the notice. As the question appears to us materially different with respect to the rent due before or after the notice, we will consider it under each state of circumstances.

First, let us consider the rent as having accrued due after notice given by the mortgagee. It is clear, that, before the new rules of pleading, the state of facts offered to be given in evidence by the defendant, would have constituted a defence to the action. *Pope v. Biggs* (a). Indeed, in the course of the argument, the objection has not been taken that the tenant is not allowed to set up this defence, on the ground that he would have been estopped from disputing his landlord's title, but only that it must be specially pleaded. The question, then, wholly turns upon the effect of the rule, which states that the plea of *non assumpsit* will operate only as a denial in fact of the

(a) 4 Man. & Ry. 193; 9 B. & C. 245.

express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law. With respect to the rent due subsequently to the notice, we think the evidence offered was admissible, inasmuch as it amounts to a denial of the matter of fact upon which the promise arises. The action is brought for the use and occupation of premises held by the defendant, by the permission and sufferance of the plaintiff; it is, therefore, a material allegation in the declaration, that the defendant held the premises in question by the permission and sufferance of the plaintiff, whereas, from the facts offered in evidence, it appears, that the defendant did not hold the premises by the permission and sufferance of the plaintiff, but of the mortgagee. The circumstance that the defendant entered under an express agreement in writing makes no difference in the rule of pleading, it is only one proof that the occupation was by the permission of the plaintiff; but when the mortgagee gave notice that the future rent was to be paid to him, it follows, that the defendant ceased to occupy by the permission of the mortgagor, but by the permission of the mortgagee. The mortgagee might have ejected the defendant from the possession. The effect of the notice is, that a new tenancy is created, and the notice affords proof that the subsequent holding has not been by permission of the plaintiffs. That is not a confession and avoidance, that the defendant held by permission of the mortgagee, but it amounts to a denial of the matter of fact upon which the contract arises. It is upon this principle we hold the evidence admissible. With respect to the rent bygone and due before the delivery of the notice, the same rule does not apply; the mortgagor had a right of action against the defendant up to the time when the notice was given; and before the mortgagee required the rent to be paid to him, the character and consequence of the occupation could not be altered. As to the bygone

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rent, this evidence does not amount to a denial of the allegation, that the occupation was by the sufferance and permission of the plaintiff, but it amounts to a confession and avoidance only. With respect, therefore, to this by-gone rent, there is no answer on the present state of the pleadings; and as it does not appear whether the rent sought to be recovered accrued due before or after the notice, we think the rule for a new trial must be made absolute.

Rule absolute.

COURT OF EXCHEQUER,

Michaelmas Term,

IN THE SIXTH YEAR OF THE REIGN OF WILLIAM IV.

BOND v. WOODHALL.

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SHEE applied for a rule under the Interpleader Act (a), on behalf of a sheriff. The affidavit did not deny collusion; and as there were contradictory decisions upon that point, he mentioned it to the Court now, in order to prevent any future objection. He referred to two cases, *Donniger v. Hinaman* (b), and *Dobbins v. Green* (c), in which cases, the Judges sitting in the *King's Bench* Bail Court had expressed opinions that it was not necessary. He was not aware of any express decision in this Court.

A sheriff or other officer, applying to the Court under the 6th section of the Interpleader Act, need not deny collusion.

LORD ABINGER, C. B.—As the act does not require the sheriff to deny collusion, I think it is unnecessary for him to do so.

PARKER, B.—There is a distinction between applications made on behalf of individuals under the first section, and applications by the sheriff under the sixth. The first section expressly requires, that the party applying shall deny that he colludes in any manner with the claimant; but the sixth section does not require sheriffs and officers

(a) 1 & 2 Will. 4, c. 58, s. 6.

(b) Ante, Vol. 2, p. 424.

(c) Ib. 509.

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who make such applications to deny collusion, and I do not see why we should require them to do that which is not required by the act. I am of opinion, that it is not necessary, and that the affidavit is in that respect sufficient.

Rule granted.

HINTON v. DEAN.

Where it is clearly shewn that an attorney keeps out of the way to avoid being served with rules for the payment of money, the Court will allow service upon his clerk to be good service. The affidavit, however, must specify the endeavours to effect a service, and the reasons for believing that he is in town, and avoiding service.

THIS was an application to the Court against an attorney, calling upon him to shew cause why the service of two rules for the payment of money by him to his client should not be deemed good service, and why he should not pay over the sums of money mentioned in those rules, and also deliver up all papers, &c., in his possession. It was supported by an affidavit, that upwards of 100*l.* had been paid to the attorney, and that upon the taxation of his bill, it was found that he had been overpaid by the sum of 35*l.*, which sum he had been ordered to repay to his client forthwith; and another order was afterwards made upon him for the payment of 5*l.*, for the costs of taxation, more than a sixth having been taken off; and that those orders had been made rules of Court, and several attempts had been made to serve him personally with the rules. Applications had been made at his office to ascertain his residence, but without success. It was sworn that his residence could not be discovered, and that he could not be found to be served with the rules, and that it was believed he was keeping out of the way to avoid being served. The Court granted a rule *nisi*, directing that the affidavits should be amended by specifying the different occasions when applications had been made, and the persons seen on those occasions, and also the reasons for believing that he was in town.

Crowder now moved to make the rule absolute. The

affidavits stated four or five different applications at the office, on which occasions a clerk was seen, who denied knowing where his master was, or where he lived. It was also sworn, that he had been seen at his father's house on a *Sunday*, but that he could not be found on any other day.

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The Court ordered the rule to be made absolute.

LAZARUS v. LEVAUX.

HUMFREY moved for a rule *nisi*, calling on the defendant to shew cause why he should not within three days add and justify two other bail in lieu of those before put in, and who had justified without exception, they having each made positive affidavits that they were worth the requisite amounts, and the plaintiff not having at that time any reason to suppose that the affidavits were not true. Shortly afterwards, however, both bail called their creditors together, stating their inability to pay their debts, and offering a small sum in the pound.

After bail had justified, the plaintiff not having excepted to them, in consequence of each of them positively swearing to the requisite amount, the plaintiff discovered that they were both insolvent:—The Court refused to compel the defendant to put in other bail.

LORD ABINGER.—This is a novel application. There must have been many instances of bail having perjured themselves, but I recollect no instance of such an application as the present.

PARKE, B.—You should have excepted to them.

Rule refused (a).

(a) *Eaglefield v. Stephens*, ante, Vol. 2, p. 438.

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RAY v. SHARP.

In order to ground an application for costs of the day, upon a rule for judgment as in case of a nonsuit being discharged on a peremptory undertaking, it is necessary that it should appear by affidavit that costs have been incurred.

UPON a rule for judgment as in case of a nonsuit being discharged on a peremptory undertaking to try at the next practicable Sheriff's Court—

Addison applied for the costs of the day as part of the rule.

Platt, contrà.—It appears by an affidavit, that no notice of trial was given, and therefore there cannot be any costs.

PARKE, B.—It is incumbent on the party applying for costs to shew that costs have been incurred: it does not appear on the affidavit in support of the motion, that any costs have been incurred, and therefore there can be no rule.

Rule refused.

BEAUMONT v. DEAN.

It is no objection to an affidavit, that it is sworn before the attorney in the cause, unless it expressly appears that he was the attorney at the time the affidavit was sworn.

HUMFREY shewed cause against a rule which had been obtained by *Hayes*, for having the bail-bond delivered up to be cancelled, on the ground that the defendant had been twice arrested for the same debt. It was objected that *Russell*, the commissioner before whom the affidavit on which the rule was obtained appeared to be sworn, was now sworn to be the attorney for the defendant in the cause.

Hayes contended, that it ought to have been expressly sworn, that the commissioner was the defendant's attor-

ney in the cause at the time that the affidavit was sworn, and he referred to 1 *Reg. Gen. H. T. 2 Will. 4*, s. 6 (a).

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The Court held that this was a good answer to the last objection.

Humfrey.—It is positively denied that the second arrest was for the same cause of action as the first.

It appeared, however, that the two arrests were for the same amount; and upon the affidavits it was doubtful whether the two arrests were not in respect of the same subject matter: the Court, therefore, ordered that question to be referred to the Master, and also the costs of the rule.

(a) *Ante*, Vol. 1, p. 184.

LEWIS v. NEWTON.

MANSEL obtained a rule *nisi* for setting aside the copy of a writ of summons, on account of the address of the defendant being wrongly stated. In the copy he was described of *Symond's Inn, Chancery Lane*, in the city of *London*, the whole of *Symond's Inn* being sworn to be in *Middlesex*, and no part in *London*.

Where an objection is made to a writ of summons, on the ground that the defendant's residence is improperly described, as being in one county instead of another which adjoins, the affidavit must be positive as to the fact, and ought to aver that there is no dispute about the boundaries.

Humfrey shewed cause.—He objected that the affidavit on which the rule was moved did not shew that there was no dispute about the boundaries between *London* and *Middlesex*; and that merely stating that no part was in *London* was not sufficient. He urged, that if there was a good description in the writ, the Court would not try upon affidavit, whether it was true or not.

Mansel, in support of the rule.—The act of 2 *Will. 4*,

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c. 39, s. 1, imperatively requires, that in every writ of summons and copy thereof, the place and county of the residence, or supposed residence, of the party defendant, shall be mentioned. The residence stated cannot be the true residence, because the affidavit states, that the whole of *Symond's Inn* is in the county of *Middlesex*, and not in *London*; and the other side not having negatived that statement, it must be taken to be true.

PARKE, B.—The act certainly requires that the defendant's place of residence shall be inserted; and in the form in the schedule, the description is "*C. D.*, of &c., in the county of —;" and if it had distinctly appeared that the whole of *Symond's Inn* was in *Middlesex*, and not in *London*, I do not see how it could be said, that the defendant's residence had been inserted. But the affidavit is not sufficiently positive as to the whole of *Symond's Inn* being in *Middlesex*; the affidavit merely says, that "the deponent is informed and believes" that *Symond's Inn* is in *Middlesex*, but it does not state by whom he was informed; and I think the affidavit is much too loose for such an objection as the present.

The other Barons, BOLLAND, ALDERSON, and GURNEY, concurring—

Rule discharged.

DOE d. SMITH v. HARDY.

The Court will not grant a rule for staying proceedings on the last day of term.

ADDISON moved to stay the proceedings in this ejectment. It was the last day of term.

Per Curiam.—Proceedings cannot be stayed on the last day of term.

Rule refused.

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SHORT v. WILLIAMS.

MANSEL, on the last day of term, moved to discharge the defendant out of custody in this action, he having remained in execution for twelve successive calendar months, for a debt not exceeding 20*l*. The defendant was in the custody of the marshal, pursuant to 48 *Geo. 3*, c. 123.

Where a defendant is in custody in any other prison than the *Fleet*, he cannot be discharged in the *Exchequer* under the Small Debtors' Act, unless a copy of the causes in which the defendant is in custody has been procured and verified by the proper officer. Such a motion cannot be made at chambers.

PARKE, B., inquired whether there was annexed to the affidavit a copy of the causes, in which the defendant was in the custody of the marshal, certified by the marshal, and verified by affidavit (a).

Mansel answered in the negative, and prayed that the motion might be renewed at chambers.

PARKE, B.—This motion can only be made in term time. It is necessary that you should have a copy of causes.

Rule refused.

(a) It was certified by the officer, that this was necessary in every case where the defendant was in foreign custody—i. e. not in the prison of the Court, (the *Fleet* Prison).

EDWARDS v. DANKS.

MANSEL shewed cause against a rule which had been obtained by *Steer*, for setting aside the service of the writ of summons and subsequent proceedings on the ground of irregularity. The action was on a bail-bond; and the

Where proceedings were taken on a bail-bond before default in the original action, the mode of taking the objection is, by moving to set aside the writ itself, and not the service of it.

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objection to the proceedings was, that there had been no default in the original action. It was now objected to the rule, that it was informal, as the ground of the motion was applicable to the writ itself, and not to the service.

LORD ABINGER, C. B.—The motion should have been to set aside the writ itself. This motion supposes a defect in the service which does not exist.

PARKE, B.—The mistake is in suing out the writ. The objection which was taken to these proceedings might have been pleaded in bar. The rule must be discharged.

ALDERSON, and GURNEY, Bs., concurred.

Rule discharged, with costs.

The KING v. The Sheriff of MIDDLESEX, in the cause of
 SPICER v. PEARCE.

Though rendering a defendant is equivalent to justifying bail for the purpose of setting aside proceedings against the sheriff, yet where a Judge's order was obtained for time to justify bail, and the defendant was rendered instead of the bail being justified, the Court would not set aside an attachment afterwards obtained, except on payment of costs.

PETERSDORFF shewed for cause against a rule for setting aside an attachment against the sheriff, for not bringing in the body, that no rule for the allowance of bail had been obtained. He cited *Rex v. The Sheriff of Middlesex*, in *Watts v. Hamilton* (a), where it was held, that if the sheriff is required by a Judge's order to bring in the body in vacation, and he does not obey it in due time, but before an attachment is obtained the defendant is rendered, the contempt is not purged, and the defendant is still liable to an attachment.

Mansel, in support of the rule.—It appears by the affi-

(a) Ante, Vol. 2, p. 432.

davits, that the rule to bring in the body was taken out on the 14th of *November*, and expired on the 17th. On the 16th a Judge's order was obtained for a week's time to justify bail, and before that time was out, the defendant was rendered, and notice of the render was given. The attachment was not obtained till afterwards. The rendering by the bail was equivalent to justifying.

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LORD ABINGER, C. B.—If time for rendering had been applied for, perhaps no time would have been given. I think the rule can only be absolute on payment of costs.

The rest of the Court concurred.

Rule absolute, on payment of costs.

REX v. DIGNAM.

DOWLING moved for a rule *nisi* for an attachment for non-payment of costs, pursuant to the Master's *allocatur*. The defendant was an attorney. The facts on which the application was founded were disclosed in the affidavit on which he moved. It appeared that a clerk of the attorney had attended the taxation before the Master, when more than one-sixth was taken off, and a certain sum of money ordered to be refunded. For the costs of taxation of this sum, the Judge's order was made. Previous to its being made a rule of Court, the order was shewn to Mr. *Dignam*, the attorney. He then refused to pay it. Subsequently, the order was made a rule of Court, and the clerk of the attorney to whom the costs were to be paid called at the chambers of Mr. *Dignam*, and there saw the clerk who had attended the taxation. He told him that he came to demand the money due on the Master's *allocatur*. The clerk stated that he had no

Under certain circumstances, where there is reason to believe that the copy rule, and *allocatur*, have come to the knowledge of the defendant, an attorney, a rule *nisi* for an attachment will be granted, although strict personal service has not been effected.

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doubt the money would be paid. Subsequently, he called again, and the clerk informed him, that Mr. *Dignam* was expected in shortly. He accordingly waited half an hour, and then left a copy of the rule with the clerk, at the same time demanding the sum mentioned in the *allocatur*, and shewing the original rule. The deponent then told the clerk to inform Mr. *Dignam*, that, unless the money was paid, an application for an attachment would be made. The clerk requested, that no steps might be taken until the next day, and the money should be paid at 4 o'clock; but this was not done, Application was again made at the office, and the clerk informed the deponent, that Mr. *Dignam* was unwell in the country; that he had seen him, and that he had desired the deponent to be informed, that the money should be paid. The money, however, had not been paid; and the question was, whether a rule *nisi* for an attachment ought not to be granted, as it was perfectly clear from what had passed, according to the statement of the affidavit, that knowledge of the rule, and of the demand, had been brought home to Mr. *Dignam*. Although the general rule was, that, in order to obtain an attachment, personal service was necessary, yet the Court had on various occasions in some degree relaxed that rule, where it was clear that the rule and demand had come to the knowledge of the party sought to be served.

GURNEY, B., was of opinion, that a sufficient ground had been laid for granting a rule *nisi* for an attachment. And at the same time directed, that the rule *nisi* should be served at the office of the attorney.

Rule *nisi* accordingly.

On a subsequent day in the term, the rule was made absolute on an affidavit of service, no cause being shewn.

Rule absolute.

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WARNE v. BERESFORD.

THIS was a rule for setting aside a judgment signed for want of a plea, and the execution thereon for irregularity. The action was in debt, and a plea of the general issue had been pleaded, but it was defective—the words “never was indebted” having been by accident omitted. The objection was, that no rule to plead had been given.

A judgment signed (after a defective plea delivered) as for want of a plea, is irregular, unless a rule to plead has been given.

A rule to plead in a wrong name is a nullity.

Petersdorff shewed cause, and contended that the defendant, by delivering a plea which was a nullity, dispensed with the necessity of giving a rule to plead, the judgment having been signed after the time for pleading was out, and a good plea not having been delivered before judgment was signed; and in support of that position cited *Lockhart v. Mackreth* (a), where a plea of *solvit ad diem*, concluding with a verification, having been improperly entered in the general issue book, and judgment signed as for want of a plea, though the defendant was entitled to have imparled, the Court held the judgment to be regular, and said, “that though it was not good as a plea, it operated as a waiver of the defendant’s right to imparl, like the common case where the defendant puts in an improper plea in abatement, which, though not good as a plea in abatement, supersedes the necessity of a rule to plead.” And in *Brandon v. Payne* (b), where judgment was signed without a rule to plead having been given, the defendant having pleaded in abatement after the four days, the Court there said, “the party may undoubtedly dispense with a rule to plead;” and they held that the defendant had superseded the necessity of a rule to plead, by pleading a bad plea in abatement: he also referred to the Practices, where the rule was laid down. Here, a rule to plead has been in fact taken out.

(a) 5 T. R. 661.

(b) 1 T. R. 689.

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Mansel, in support of the rule.—It is sworn, that a search was made for a rule to plead in this cause, and that none could be found. The rule to plead which was taken out was in a wrong name—“*Ware v. Beresford*.” The defendant never intended to waive the rule to plead.

PARKE, B.—There was a case in this Court some time since, where the question was, whether a defendant by pleading a defective plea within the time for pleading, waived the remainder of the time, so as to make a judgment signed within the time allowed for pleading, but after the defective plea had been delivered, regular; and there being some doubt in the minds of the Court, the officers of the Court of *King's Bench* and of this Court were consulted, and they certified the practice to be, that such a judgment was irregular, and that the defendant did not waive the remainder of the time for pleading for the purpose of enabling the plaintiff to sign judgment (a). The principle of that case applies to this:—the plaintiff has treated the defendant's plea as a nullity, as if there was no plea, and if there had been no plea at all, the judgment would clearly have been irregular for want of a rule to plead: here, the rule was in a wrong name, and therefore I think the judgment was irregular.

LORD ABINGER, ALDERSON and GURNEY, B., concurred.

The rule was absolute, but by consent without costs, the plaintiff agreeing to allow the defendant to amend and plead another plea.

(a) See this case, *Macher v. Ib.* 249, note (a); and see *Dakin's Billing*, ante, Vol. 3, p. 246; and *v. Wagner*, Ib. 535, S. P.

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KIRK v. CLARK.

THIS was an application under the Interpleader Act. Upon the rule coming on to be argued—

Where a new claim is raised, after a rule nisi under the Interpleader Act has been obtained, the sheriff may make the new claimant a party to the rule.

Moody, for the sheriff, applied, upon an affidavit that since the rule had been obtained the defendant had become bankrupt, for leave to bring before the Court the assignees, who now claimed the goods.

Erle, for the assignee under a bill of sale, objected, that under this rule no other claimants could be brought forward.

George appeared for the execution creditor.

PARKE, B.—I think the assignees must now be made a party to the rule, and it must be enlarged until the claimant under the bill of sale consents.

Erle then offered to bring into Court 42*l.* 2*s.* 6*d.*, the amount of the levy, on having the goods delivered up.

PARKE, B.—You must bring into Court the *value* of the goods.

 ROOKE v. SHERWOOD.

MILLER shewed cause against a rule which had been obtained by *Humfrey* for setting aside an interlocutory

A notice of declaration being filed, served in the country at

150 miles' distance on the day the declaration is stated to be filed, is regular.

A motion to set aside a judgment as irregular for being signed too early on the 13th, notice of declaration not having been given till the 5th, was held to be answered by an affidavit that the notice was served on the 4th; though it was not shewn whether the notice was served on that day before or after declaration filed.

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judgment with costs for irregularity, on the ground that it was signed too early. The affidavit in support of the rule alleged, that the declaration was filed on the 4th of *November*, and notice of its being filed was not given to the defendant till the 5th, he living at a distance of one hundred and fifty miles from *London*. The judgment was signed on the 13th. The affidavit in answer alleged, that the defendant was personally served on the 4th with a notice of a declaration filed that day. It was admitted, that the notice was served before it could be possibly known whether the declaration had been filed or not; but it was contended, that it was the constant practice, and that it was done to save time.

Humfrey, in support of the rule, contended that it was an improper practice, as the notice must have been sent off before the declaration was filed, and the party serving the notice could not know whether it was true or not; and it was not now shewn at what time of the day the notice was served or the declaration filed, or that the notice was served after the declaration was filed.

PARKE, B.—In strictness the time ought to have been stated, but as the attention of the other side was not called to the precise time, the affidavit in support of the rule alleging that the service was on the 5th, which is positively contradicted, the ground of the motion fails. I think, therefore, that the rule should be discharged.

ALDERSON, B.—I am of the same opinion. The service of the notice of declaration was correct, according to the practice.

Rule discharged.

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BUXTON v. SQUIRES.

THIS was an application under the compulsory clauses of the Lords' Act, 32 Geo. 2, c. 28, s. 16.

If the twenty days' notice to a prisoner under the Lords' Act expires on the first day of a term, he cannot be compelled to appear till the next term.

Humfrey, for the prisoner, objected that the notice was insufficient. It was dated *October 13, 1835*, and it required the defendant to appear within the first seven days next ensuing the expiration of the notice (a). The words of the act are, that "such creditor is hereby authorized to require such prisoner (on giving twenty days' notice in writing to him that such creditor designs to compel such prisoner to give into the court, within the first seven days of the term which shall *next ensue the expiration* of the said twenty days, upon oath, a true account in writing of all his real and personal estate,) to discover and deliver up his estate," &c. In reckoning the twenty days, the time must be reckoned exclusive of the first day, and inclusive of the last, according to the usual mode of computing time, and according to the eighth rule of *Hilary Term, 2 Will. 4 (b)*, which directs the first day to be excluded, and the last day to be included, in computing the time on rules. Here the twenty days (excluding the 13th of *October*, the day of giving the notice) would include the 2nd of *November*, the first day of this term; and then the only question is, whether the word "which," in the act, refers to the last antecedent word "term," or to the previous words "seven days;" for if it refers to the "term," the insolvent cannot be brought up till next term. Upon this point *Hayward v. Priest (c)* is a direct authority

(a) The prisoner was brought up on Saturday, the 7th of November.

(b) Ante, Vol. 1, p. 200.

(c) Ante, Vol. 2, p. 737; 3 M.

& Scott, 388, S. C. The Court are there made to say, that the words "within seven days of the next term" must be taken with reference to the last antecedent;

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that "which" refers to the last antecedent; and it was there held by the Court of *Common Pleas*, that if the twenty days expire on the first day of a term, the prisoner is not bound to appear in that term.

White, on behalf of the creditor, contended, that the prisoner was bound to appear in the present term; and he relied upon two cases, *Dereuxy v. Gordon*, *M. T. 37 Geo. 3*, cited in *Chitty's Statutes*, Vol. 1, p. 582, note (c), where the notice expired on the 18th of *November*, within the term, and the prisoner was brought up on the 26th; and *Lawrence, J.*, held, that this was regular, although the seven days were within the *same* term in which the notice expired. *Jones's case*, cited in *Chapman's Practice*, 316, is to the same effect, the notice there having expired within the term; and *Parke, J.*, in the Bail Court, held it sufficient.

LORD ABINGER, C. B.—It is clear, that, in reckoning the twenty days, the first day of this term ought to be included, and therefore the only question is, whether the words of the act "which shall next ensue," coming after the words "within the first seven days of the term," refer to the word "term," which is the last antecedent, or to the previous words "seven days." I am of opinion, that they refer to the last antecedent, "term;" and, consequently, that the prisoner cannot be brought up till next term.

PARKE, B.—*Jones's case* appears to have been decided by me, on the authority of a previous decision to the same effect, by Mr. Justice *Buller*. In the later case of *Hay-*

this is evidently a mistake; the words of the act are, "within the first seven days of the term *which* shall *next* ensue," &c.; and the doubt was, whether the words

"which shall next ensue," coming after the words "within the first seven days of the term," referred to the last antecedent "term," or to the previous word "days."

ward v. Priest, the Court of *Common Pleas* have put a different construction on the act, which I think is the true one, and that the words "which shall next ensue" refer to the last antecedent "term." This application is, therefore, too early.

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ALDERSON, B.—I am of the same opinion. I agree with the opinion of the Court in *Hayward v. Priest*.

GURNEY, B.—The "next" term has not arrived, and the plaintiff is therefore too early.

The prisoner was remanded (a).

(a) In *Rogers v. Peckham*, ante, Vol. 3, p. 142, 1 Scott, 121, the Court of Common Pleas again put the same construction on the act. See also *Acraman v. Harrison*, 1 M. & Scott, 240; 3 Bing. 154, S. C.; *Langdon v. Rosseter*, M'Clel. 6; 13 Price, 186.

STANFORTH v. M'CANN.

ADDISON applied that an *exoneretur* might be entered on the bail-piece, the defendant having in lieu of bail paid in the debt, and 20*l.* for costs, under the 7 & 8 Geo. 4, c. 71, s. 2.

Erle, for the plaintiff, opposed the application, on the ground that bail above had been put in on the 2nd of *November*, and notice of justification given, in consequence of which an expense had been incurred in searching for the bail and preparing notice of exception; and he urged, that notice of the money being paid in not having been given until the 5th, the defendant was not entitled to pay in the money at all, or at least not without the leave of

Before bail above are perfected, or until the time for excepting to them has passed, the defendant is entitled as a matter of right to pay in the debt, with a sum for costs, under the 7 & 8 Geo. 4, c. 71, s. 2; and therefore, though he does not pay in the money until after he has put in though not justified bail above, and the plaintiff has

been put to expense by searching for them, and making inquiries, the defendant is not liable to pay those expenses, but they are properly costs in the cause.

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the Court, and upon payment of the costs occasioned by bail above having been put in.

GURNEY, B. (a), expressed an opinion, that the costs ought to be costs in the cause; but, having some doubt about it, desired it to be mentioned to the full Court.

Addison on the following day renewed the application.—He contended, that the defendant had a right to pay in the money at any time, and that the Court had no power except under the act, the words of which were general, “that, in all cases where any defendant shall have been arrested, it shall be lawful for him, instead of putting in and perfecting special bail, to deposit and pay into Court the sum indorsed on the writ, together with 20% for costs, and also to enter an appearance within such time as he would have been required to put in and perfect special bail, according to the course of the said Court.” No motion is necessary to be made to the Court, except where the defendant, having put in and perfected special bail, is desirous of paying in the debt and costs to exonerate those bail; but before special bail perfected, he contended that it was a matter of right for the defendant to pay in the debt and costs, and that, if any incidental costs had been incurred, they would be costs in the cause. Here, bail above were put in in due time, on the 2nd of *November*, merely to prevent an assignment of the bail-bond; on the 4th the money was paid in, and on the 5th notice was given to the plaintiff.

Erle.—The words of the act are, “instead of putting in and perfecting the bail.” Here, bail above were put in, and costs were unnecessarily occasioned by that act; those costs, therefore, are in the discretion of the Court, and ought to fall upon the defendant.

(a) Sitting alone.

PARKE, B.—This is a matter of very frequent occurrence, and it appears to me, at present, that the defendant cannot pay in the debt after bail above have been put in, without the leave of the Court, upon the same principle that bail cannot be changed without leave; but the case may stand over, in order that a search may be made for authorities.

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On a subsequent day, *Erle* said he had been unable to find any express authority; and he contended, that, the act having made an express provision for a case where the defendant has perfected bail, in which case it directs that a motion shall be made to the Court, and the other clause only giving leave to pay in the debt in lieu of putting in and perfecting bail, this was not a case within the act, and that the money could only be paid in as a matter of favour; and he argued, that the bail was to be considered as perfected *quoad* the defendant, until they are excepted to, which in this case had not been done.

Addison, *contra*, cited *Newman v. Hodson* (a), *Rowe v. Sofly* (b), and *Straford v. Love* (c), as being somewhat in point, and in the two latter of which cases it was held, that the act being for the benefit of defendants, ought to be construed liberally in their favour; there is nothing in the words of the act to prevent the defendant from paying in the debt, though bail are put in, for the words of the act are “in lieu of putting in *and* perfecting bail.” If the bail had come up to justify and failed, the costs attendant thereon would have been costs in the cause; here the plaintiff had twenty days to except, and until that time had passed it could not be said that the bail had justified.

(a) 2 B. & Adol. 422.

(b) 6 Bing. 634; 4 Moore & P. 464.

(c) Ante, Vol. 3; p. 593.

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LORD ABINGER, C. B.—It appears to me, that these costs ought not to be thrown on the defendant, but that they are properly costs in the cause. Supposing the defendant had, instead of paying in money, rendered to prison, or had given fresh notice of bail, who had justified, the plaintiff would not have had these costs; and the only difference is, that the plaintiff is now in a better situation by having the money itself in Court.

PARKE, B.—I think my first impression was wrong, and that the defendant had a right to pay in the money until the time for excepting to the bail had gone by, because until then, it could not be said that the bail were perfected, and the defendant would have been at liberty to have changed the bail.

ALDERSON, B.—I am of the same opinion.

Rule absolute for an *exoneretur*.

FORSTER v. KIRK WALL.

It is sufficient to have one rule for making a Judge's order a rule of Court, and for an attachment thereon.

GODSON moved to make a Judge's order which had been obtained in vacation, and which had not been complied with, a rule of Court. He also applied for an attachment thereon, and referred to a case in the *King's Bench* Bail Court, of *Hinchcliffe v. Jones* (a), in which Mr. Justice Coleridge was of opinion, that, though the application for making the order a rule of Court and for an attachment might be made at the same time, yet that it was necessary there should be two rules. He said, that some difference of opinion existed on the point, but he submitted that the rule of Court ought to be in existence before

(a) Ante, p. 86.

an attachment could properly be applied for for disobedience to it.

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PARKE, B.—I think there is no necessity for two rules. One rule will be sufficient. If it was necessary to perfect the contempt by making the Judge's order a rule of Court, there would be a reason for having two rules, but the contempt was complete before.

Lord ABINGER, ALDERSON and GURNEY, Bs., expressed the same opinion, that one rule was sufficient (a).

Rule accordingly.

(a) That seems to have been the opinion of this Court in *Howell v. Bulleel*, ante, Vol. 3, p. 99.

LENEHAM v. GOOLD.

CHANNELL shewed cause against a rule which had been obtained by *Hurlstone* for setting aside the verdict for the plaintiff, and for a new trial, on the ground that a proper notice of trial had not been given to the defendant. The rule was obtained on the ground that the defendant being resident in *Ireland* at the time the notice of trial was given, he ought to have had fourteen days' notice, instead of which only eight days' notice had been given. In answer to the rule, it was objected, that there was no affidavit by the defendant himself or his attorney, but only an affidavit by two persons, who, as was sworn by the plaintiff's attorney, were the defendant's bail. It appeared from the affidavits in answer to the rule, that

A defendant after being arrested in *London* on a bill of exchange, and having accepted a declaration with notice to plead in four days, without objection, went over to *Ireland*, and was there when notice of trial was given to his attorney in *London*. Upon an application for a new trial, upon the ground that, being resident in *Ireland*, he was entitled

to fourteen days' notice, and not merely to eight days, which had been given, the Court refused to interfere, the affidavit in support of the rule merely stating that the defendant's residence was then, and had been for some time past, in *Cork*, but it did not explain how he came to be in *London* at the time of the arrest, nor where his general place of residence was.

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the action was on a bill of exchange against the defendant as acceptor; that the only plea was, that the bill was not accepted by the defendant, and the proof of the defendant's handwriting was by the usual admission of the defendant's attorney to save expense: that the defendant was arrested in *London*; that only four days' time to plead was given, and no objection was made; and that though when the notice of trial was served, the defendant's attorney said it was irregular, he did not say that the defendant was in *Ireland*, and it was sworn that the defendant was in *London* from *June* to *September*. It was contended, therefore, that the rule must be discharged, as there was nothing to shew that the defendant's being in *Ireland* was not casual and temporary; it not being alleged that the defendant whilst he was in *London* was only temporarily resident there.

Hurlstone, in support of the rule.—It is not denied that the defendant was in *Ireland* at the time the notice of trial was given; the affidavit in support of the rule expressly says "that the defendant's residence is now, and has been for some time past, in *Cork*." The defendant, therefore, being in *Ireland*, was, according to all the authorities, entitled to fourteen days' notice of trial. No affidavit could be obtained from the defendant himself in time, because he was absent in *Ireland*. Nothing has been done by him to waive his right to the full notice of trial; the four days' time to plead was not objected to because it was perfectly regular, the defendant then being in *London*; and if the defendant's being merely temporarily resident in *Ireland* is sufficient to deprive him of the full notice of trial, it is not to be assumed against him, upon these affidavits, that *Ireland* is not his usual place of residence.

PARKE, B.—We ought to be well satisfied that the

defendant is permanently resident in *Ireland* before we make such a rule as this absolute.

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LORD ABINGER, C. B.—I think there ought to have been a more satisfactory affidavit either from the defendant himself or his attorney. There is nothing to shew that the defendant may not return next week to *London*.

ALDERSON, B.—The defendant ought to have shewn that while resident in *London*, he was only temporarily resident.

GURNEY, B., concurred.

Rule discharged, costs to be costs in the cause.

MILLIGAN v. THOMAS.

THIS was an action for goods sold and delivered, to which the defendant had pleaded *non assumpsit*; and at the trial, before the under-sheriff, a verdict passed for the defendant.

Lumley obtained a rule *nisi* for setting aside the verdict, on the ground that payment could not be given in evidence under this plea in bar of the action, and that, as the sale and delivery of the goods was proved, the plea of *non assumpsit* admitted that something was due.

Channell shewed cause.—He objected that the pleadings did not appear, as the rule was only drawn up on reading the under-sheriff's notes and two affidavits.

PARKE, B.—On moving for a new trial, the *postea* is always supposed to be in Court, and no affidavit is required of the pleadings, and there is no reason for mak-

On moving to set aside a verdict on a trial before the under-sheriff, on an objection founded upon the pleadings, it is not necessary to have an affidavit of the pleadings, as the *postea* is supposed to be in Court.

Payment cannot be given in evidence under the plea of *non-assumpsit* in bar of the action.

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ing any distinction between a cause which is tried before the under-sheriff under the Writ of Trial Act, and a cause tried before a Judge at *Nisi Prius*.

Lord ABINGER, C. B.—The action is still in this Court, though the trial took place in another Court.

Channell admitting that he could not support the verdict—

The Court made the rule absolute.

Rule absolute (a).

(a) See *Shirley v. Jacobs*, ante, p. 136; and 2 Scott, 157, S. C.

DOE d. SMITHERS v. ROE.

A declaration in ejectment intituled by mistake of *Trinity* Term, 6 *Will.* 4, instead of 5 *Will.* 4, but dated Aug. 1, 1835, was held sufficient to warrant a rule for judgment against the casual ejector.

GALE moved for judgment against the casual ejector. The declaration was dated *August* 1, 1835; but the declaration was intituled *Trinity* Term, 6 *Will.* 4. The notice was to appear in *Michaelmas* Term next following.

PER CURIAM.—You may take your rule. The tenant could not be misled by the mistake in the title of the declaration.

Rule granted.

EVANS v. DELEGAL.

An attorney having brought an action for his bill of costs, which was de-

HENDERSON obtained a rule *nisi* calling upon the plaintiff to shew cause why the defendant should not be defended by the client, on the ground of negligence, was ordered to give to the defendant a copy of a case, with the opinion of counsel thereon, (which had been procured for the defendant by the plaintiff as his attorney), at the defendant's expense, or to deliver up the case itself on being paid the costs which the plaintiff claimed in respect of such case and opinion.

allowed to inspect (unless the plaintiff should give a copy of it) a case, with the opinion of Sir *John Campbell*, the Attorney-General, thereon, and why he should not have four days' time to plead after such inspection or copy had been granted. The action was by an attorney for the balance of his bill of costs, part having been paid on account. The defence intended to be set up was, negligence on the part of the plaintiff, and the case and opinion in the plaintiff's possession were drawn and taken by the plaintiff as attorney for the defendant, and the plaintiff claimed a lien upon them. The affidavits stated, that there was a good defence to the action on the merits, but especially on the ground of negligence, and that it was necessary to have an inspection of the case and opinion.

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Tyndale shewed cause.—He compared this to the case of *Rowe and others v. Howden* (a), which was an action by shipowners against their broker; and upon an application by the plaintiffs to compel the defendant to allow them to take a copy of a letter which the defendant had received as broker, touching the adventure in which the ship was to have been employed, the Court of *Common Pleas* refused to interfere, saying, that it was merely fishing for evidence. *Lord v. Wormleighton* (b) is an authority to shew that the defendant having a lien upon these papers is not bound to give them up, or to allow an inspection, until the costs are paid. But, as the defendant contends, that, through the plaintiff's negligence, he, the defendant, is not bound to pay the plaintiff, these papers cannot be considered to be the defendant's property, and therefore he has no right to claim an inspection.

LORD ABINGER, C. B.—I think the defendant is entitled

(a) 1 M. & P. 334; 4 Bing. 539, S. C.

(b) 1 Jacob, 580.

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to an inspection: he may want the case for the purpose of shewing the negligence of which he complains.

PARKE, B.—The case and opinion are clearly the property of the client, whether the attorney have been guilty of negligence or not. *Lord v. Wormleighton* was a different case. The plaintiff must furnish a copy at the defendant's expense, or the defendant may pay the attorney's charges for the case and opinion, and he will then be entitled to have the original delivered up to him.

Rule absolute, without costs.

SUTTON v. BURGESS.

Where a defendant was arrested for 20*l.* and upwards, and the jury gave only 17*l.* 19*s.*:—*Held*, that the defendant was entitled to costs under the 43 Geo. 3, c. 46, s. 3, it appearing that the plaintiff had first sent in a bill for the above sum, and had afterwards added 2*l.* 2*s.* for goods supplied, which had been returned as unsuitable, there being reason to believe that the plaintiff had added that sum to make up an arrestable amount.

THIS was a motion under the 43 Geo. 3, c. 46, s. 3, to tax the defendant his costs, he having been arrested for 20*l.* and upwards, and the plaintiff having recovered only 17*l.* 19*s.* 10*d.* From the affidavits it appeared, that the plaintiff was a surgeon and apothecary, and had attended on the defendant and supplied medicines, and amongst other things had sent her a pair of stays, which he had advised her to wear. The plaintiff first sent in a bill for the amount which the jury gave him, and in which bill there was no charge for the stays; but shortly before the arrest he sent in another bill, adding a charge of 2*l.* 2*s.* for the stays, which were not charged in the first bill, and thereby made the bill amount to more than 20*l.* At the trial a witness was called for the defendant, who proved that the stays could not be worn by her, because they were too small, and that they had been returned; and the circumstance of two bills having been sent in was also commented upon by the defendant's counsel. It was also sworn in support of the rule, that the plaintiff came with the officer to the defendant's residence, and that the officer told

her, that if she would give up a gold watch to the plaintiff he would take it for his bill, and there was no affidavit of the plaintiff's to contradict this. At the trial two points were made for the defendant—*first*, that the plaintiff was not an apothecary; and, *secondly*, that he was only entitled to recover the amount of the first bill. The jury were three hours deliberating, and found for the plaintiff for the amount of the first bill only. The plaintiff, in answer to the rule, swore that the stays had been worn, and were returned in a state unfit for use; that he had paid three guineas for them, and that the two guineas were charged for the use of them.

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Humfrey was heard against the rule.

Erle and *Sewell* in support of it.

The Court were of opinion that no reasonable ground had been shewn for the arrest for the two guineas; and that, as without that sum there would have been no arrestable amount, the rule ought to be absolute.

Rule absolute.

LEWIS v. LYSTER.

ASSUMPSIT.—The declaration stated, that, whereas one *H. J. Bouverie*, on the 13th day of *April*, 1831, made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay

To an action on a bill of exchange by an indorsee against the acceptor, the defendant pleaded, that after it became

due the defendant gave to the holders a bill for a larger sum, and that they accepted it in satisfaction of the first bill, and afterwards indorsed it to one *P. S.*, to whom the money was afterwards paid in satisfaction of that bill, and of all damages sustained by the *plaintiff*, by reason of its non-payment, and that the indorsement to the plaintiff of the first bill was after the second bill had been given: but the plea did not allege that the second bill was negotiable:—*Held*, on special demurrer, that the plea was sufficient.

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to the said *H. J. B.*'s order the sum of 165*l.* for value received, two months after the date thereof, which period has now elapsed, and the defendant accepted the said bill, and the said *H. J. B.* indorsed the same to one *John Aldridge*, who indorsed the same to the plaintiff, of all which the defendant then had due notice, and promised the plaintiff to pay the amount thereof according to the tenor and effect thereof, and of his acceptance thereof.

Plea.—And the said defendant, by *W. W.* his attorney, as to the first count of the said declaration, says, that the plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says, that, long before the said bill of exchange became due and payable, according to the tenor and effect thereof, the said *H. J. B.* (the drawer of the said bill of exchange) duly indorsed the same to one *A. C.*, who afterwards, and also long before the said bill of exchange became due and payable, indorsed the same to certain persons using the name, style, and firm of *Braithwaite & Jones*, who afterwards, and before it became due and payable, indorsed the same to one *Chawner*, in whose possession the said bill of exchange at the time it became due and payable, according to the tenor and effect thereof, remained and continued. And he, the said *Chawner*, when the said bill of exchange became due and payable as aforesaid, so being the holder thereof as aforesaid, caused the same to be presented to the said defendant, for payment of the said sum of money therein mentioned; but default being made in payment thereof, the said *Chawner* afterwards, and before either of the said supposed indorsements in the said first count mentioned, returned the said bill of exchange to the said persons using the name, style, and firm of *B. & J.* as aforesaid. And the said bill of exchange remained and continued in the possession of those last-mentioned persons, who thenceforth, and until, and at the time of the discharge and satisfaction of the amount thereof, as herein-

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after mentioned, remained and continued holders of the said bill, and entitled to receive the said sum of money therein mentioned. And the said defendant further saith, that afterwards, and long before the commencement of this suit, and before the supposed indorsment and delivery of the said bill of exchange, either to the said *J. A.*, in the said first count mentioned, or by him the said *J. A.* to the said plaintiff, as therein mentioned, he, the said defendant, handed over and delivered to the said persons so using the name, style, and firm of *Braithwaite & Jones* as aforesaid, (so then being the holders of the said bill of exchange as aforesaid), and those last-mentioned persons then accepted and received from the defendant, a certain bill of exchange, in writing, drawn by the said *H. J. B.* upon, and accepted by the said defendant, at three months' date from the 26th day of *May*, 1831, for 500*l.*, value received, in full satisfaction and discharge of the said sum of money in the said bill of exchange in the said first count mentioned, and all damages by them sustained by reason of the non-payment thereof on the day when the same became due and payable, according to the tenor and effect of the said bill of exchange, as aforesaid. And he, the said defendant, further says, that afterwards, and after the said bill of exchange for 500*l.* was handed over and delivered to the said persons so using the name, style, and firm of *B. & J.*, to wit, on the day and year last aforesaid, the said *B. & J.* indorsed and delivered the said last-mentioned bill of exchange to one *Frederick Seagood*; and that afterwards, and after the said bill of exchange for 500*l.* became due and payable, to wit, on the day and year aforesaid, the said *Frederick Seagood* then being the holder thereof, and entitled to demand, and have, and receive the amount thereof, he, the said defendant, paid to the said *F. S.* so being such holder of the said last-mentioned bill, a certain large sum of money, to wit, the sum of 506*l.* 10*s.*, in full satisfaction and discharge of the

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said sum of money in the said last-mentioned bill of exchange specified, and all damages *by the said plaintiff* by reason of the non-payment thereof when the same became due and payable, according to the tenor and effect of the said last-mentioned bill of exchange. And the said defendant further saith, that the said bill of exchange in the said first count of the said declaration mentioned was not transferred or delivered to the said *John Aldridge*, or indorsed to or by him, until and long after the said bill of exchange became due and payable, nor until after the said persons so using the style and firm of *B. & J.*, and so being holders thereof when the said bill of exchange in the said first count mentioned became due and payable, had so accepted and received the said bill of exchange of 500*l.* in full discharge and satisfaction of the said bill of exchange in the said first count of the said declaration mentioned, to wit, on the day and year last aforesaid; and this he, the said defendant, is ready to verify.

Demurrer.—And the plaintiff, as to the plea of the defendant by him first above pleaded, says, that the same is insufficient in law; and for causes of demurrer the plaintiff says that it does not appear, nor is it stated in or by that plea, that the said bill of exchange for the payment of 500*l.* was payable to the order of the said *B. & J.*, or otherwise negotiable, and therefore the said *F. S.* had no legal right to, or interest in, that bill, or was entitled to receive the amount thereof, and give any acquittance or discharge for the same, and therefore it does not appear that the bill has ever been legally paid or satisfied; and also, for that it is in that plea stated, that the defendant paid to the said *F. S.* the said sum of 506*l.* 10*s.* in satisfaction of damages by the plaintiff, by reason of the non-payment thereof; whereas it does not appear that the plaintiff was entitled to any damages by reason of that non-payment, and that averment is in other respects unintelligible and informal, and the said first plea is in other respects bad and insufficient.

The grounds of demurrer stated in the margin were, that the first plea did not allege that the 500*l.* was payable to *B. & J.'s* order, so that it did not appear that *Seagood* had a right to receive payment thereof. Also, that it was alleged that *Seagood* received the payment in satisfaction of damages by the plaintiff by the non-payment thereof, when the plaintiff had nothing to do with it.

Joinder in demurrer.

Humfrey, in support of the demurrer, contended that the plea was bad for not shewing that the second bill was negotiable; and unless it was, the indorsement to *Frederick Seagood* was void; and that, unless the second bill of exchange was negotiable, it was no satisfaction of the first bill, which was negotiable; and also that there was nothing to shew that the plaintiff was not a holder for value. The defendant, he urged, should have withdrawn the first bill from the hands of *Braithwaite & Jones*.

Petersdorff, contra, was stopped by the Court.

PARKE, B.—I think the plea would have been good if it had stopped with that part of it where the payment of the 506*l.* 10*s.* is averred: but the plea further alleges, that that sum was paid in satisfaction of the first bill, which was not indorsed to the plaintiff till after it was due, and after the then holders had accepted the 500*l.* in satisfaction. The judgment must be for the defendant.

BOLLAND, ALDERSON, and GURNEY, Bs., concurred.

Judgment for the defendant.

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In an affidavit of debt against the drawer or indorser of a bill of exchange, it is sufficient to allege a default by the acceptor, without averring a presentment or notice.

WITHAM v. GOMPERTZ.

THIS was a rule for setting aside an order of *Bolland, B.*, by which the bail-bond had been ordered to be cancelled, upon entering a common appearance, on the ground of the insufficiency of the affidavit to hold to bail. The action was brought by an indorsee against the drawer; the affidavit was in the following form: *Francis Witham, of Gray's Inn Square, in the county of Middlesex, clerk to William Witham, of the same place, gentleman, maketh oath and saith, that Henry Gompertz is justly and truly indebted to the said W. W. in 250*l.*, for principal money due to the said W. W., as indorsee of a bill of exchange, drawn by the said Henry Gompertz on Mr. George Phibbs, for the payment of the said sum of 250*l.*, to the order of the said H. G., at a day now past, and by the said H. G. indorsed to the said W. W., and which said bill hath been refused payment by the said George Phibbs.*

Wordsworth shewed cause.—He contended that the affidavit was insufficient, for want of shewing that the bill was presented to the acceptor when it became due; and he relied upon *Simpson v. Dick* (a), in which it was expressly determined that an affidavit against the drawer, merely stating that the bill still remained due and owing, without any averment of a presentment or notice, was insufficient; and three other cases were there cited to the same point: *Buckworth v. Levy* (b), *Cross v. Morgan* (c), and *Banting v. Jadis* (d). Here no acceptance is stated, nor that any notice of non-payment was given to the defendant, nor is it even stated that the bill is now overdue and unpaid;

(a) Ante, Vol. 3, p. 731.

(c) Ante, Vol. 1, p. 122.

(b) 5 Moore & P. 23; 7 Bing.

(d) Ib. 445.

251; ante, vol. 1, p. 211.

Weedon v. Medley (a), which is the only case on the other side, appears to have undergone very little consideration at the time, and it was cited in the subsequent case of *Simpson v. Dick*, which was decided contrary to it.

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Hunfrey, in support of the rule.—There has been no case in which it has been held that it is necessary to aver a presentment or notice. In *Buckworth v. Leay*, no default of the acceptor was shewn. *Bosanquet, J.*, says, "I rest on the ground that it is part of the ordinary form of affidavit in an action against the drawer, to allege the default of the acceptor; and a party who neglects to adopt the ordinary form, has no claim to the favour of the Court;" and *Alderson, J.*, says, "the moment there has been a default on the part of the acceptor, the drawer becomes liable, and it is not necessary for the affidavit to go further, the rest is matter of defence." The present affidavit does follow the form given in the books of practice. In *Tidd's Appendix*, the affidavit merely contains this allegation, "and which said bill hath been refused acceptance (or payment) by the said G. H." It has never been contended that it is necessary to allege notice; and yet the drawer is no more liable where there has been a want of notice than he is where presentment in due time has been neglected; both are equally necessary; and therefore, unless the affidavit is to contain all the particulars of a declaration, it ought to be sufficient to allege that the acceptor has made a default, by which the deponent in effect avers, that the necessary requisites have been complied with. Many bills are accommodation bills, where no presentment or notice is in general necessary; but no difference is ever made in the form of the affidavit of debt. *Weedon v. Medley* is expressly in point; it was there held to be unnecessary to allege either presentment or notice,

(a) Ante, Vol. 2, 689.

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and that is consistent with the earlier case of *Bradshaw v. Saddington* (a). The difficulty has arisen from supposing that the Court of *Common Pleas* had held that it was necessary to aver a presentment, whereas that Court merely held that the affidavit must shew a default by the acceptor; here the affidavit does shew such a default.

LORD ABINGER, C. B.—It is not necessary that this affidavit should allege an acceptance, but I certainly had some doubt whether it ought not to have shewn a presentment; upon the whole, however, I think that the affidavit is sufficient.

PARKE, B.—There certainly is a difficulty in saying that it is necessary to shew a presentment, and yet that notice need not be shewn, both being equally requisite to fix the liability of the drawer; but I have often refused to discharge defendants, where the only objection to the affidavit was, that notice was not averred. On the other hand, it is necessary to give a greater effect to the word “indebted;” and we must go the length of saying, that the meaning of the affidavit, which wants those averments, really is, that such a presentment and notice have been given, or that there is an excuse for not giving them. Upon the whole, I think that it is not necessary to allege a presentment or notice, and that we had better abide by the form as given by Mr. *Tidd*, which has been acted on for so many years. It certainly was a mistake to suppose that the Court of *Common Pleas* considered it necessary that a presentment should be shewn; all that that court decided was, that it was necessary to shew a default by the acceptor. Upon this affidavit I think an indictment for perjury would lie, if in point of fact the defendant is not liable, in consequence of the want of due presentment or notice.

(a) 7 East, 94.

ALDERSON, B.—I think there is a sufficient *prima facie* debt shewn on the face of this affidavit, and that it is safer to adhere to a precedent which has been in use for a great many years. Upon a review of the authorities, I adhere to the opinion expressed by this Court in *Weedon v. Medley*.

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GURNEY, B.—I am of the same opinion.

Rule absolute (a).

(a) Vide *Irving v. Heaton*, C. P., H. T. 1836, post.

DOE d. PROTHEROE v. ROE.

ERLE moved to set aside a judgment signed against the casual ejector, on the ground that there had not been a proper service of the declaration. There was an affidavit of the tenant in possession and his two sons, in answer to the affidavit of service, which stated that the person who served the declaration went to the house on the afternoon of the 31st of *October*, and there saw the tenant's son, who said his father would be home in an hour; that he afterwards saw the father come home, and then left the declaration with the son for his father. The affidavit, in answer, denied that the father had ever kept out of the way to avoid being served; that he was not at home when the declaration was left; that he left his house at 4 o'clock on the 31st, on business, and did not return till *Sunday*, the 1st of *November*.

Where a declaration in ejectment was served on the son of the tenant in possession, upon an affidavit that the father was in the house at the time, the Court refused to interfere, on counter affidavits that he was not at home, but was absent on business, and, not to avoid service, the affidavits not negating that the son gave the declaration to the father before the first day of term.

PARKE, B.—The father does not swear that he did not get the declaration before the first day of term (a). The affidavits do not exclude the possibility of the son having given it to him, and if he did, we should not interfere. He had better appear.

Rule refused.

(a) November 2nd.

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HOWELL and SCOTT, Assignees, &c., v. BOWERS.

To a *scire facias* in this Court on a judgment obtained in the Court of Great Session, before its abolition by the 11 Geo. 4 & 1 Will. 4, c. 70, the defendant pleaded that, by the practice of the Court of Great Session, an affidavit ought to have been first made of the amount of the debt really due, which had not been done:—
Held bad on demurrer, as well because it was a mere matter of practice, as because that practice was in fact abolished with the Court; and that the only mode of making the objection available was by motion to the discretion of the Court, who would have ordered such an affidavit to be made, or not, as might appear right under the circumstances.

SCIRE facias. Declaration.—*Carmarthenshire*, to wit. —Our Lord the King sent to his sheriff of *Carmarthenshire* his writ close in these words, to wit, *William* the Fourth, by the grace of God of the united kingdom of *Great Britain* and *Ireland* King, defender of the faith, &c. To the sheriff of *Carmarthenshire*, greeting. Whereas *John Waters* and *David Jones*, heretofore and before the passing of a certain act of parliament made and passed in the first year of the reign of our Sovereign Lord *William* the Fourth, intituled, “An Act for the more effectual Administration of Justice in *England* and *Wales*,” that is to say, on the 24th day of *September*, 1828, in the court of Great Session, held in and for our county of *Carmarthen*, before *N. G. Clarke* and *E. Goulburn*, esquires, our justices then duly assigned to hold pleas in our said Court of Great Session, by the consideration and judgment of the same Court, recovered against *Henry Bowers* their damages to 850*l.*, and also 5*l.* 8*s.* 3*d.* for their costs and charges by the said Court of Great Session adjudged to the said *John Waters* and *David Jones*, with their assent; which said damages, costs, and charges, in the whole amounted to 855*l.* 8*s.* 3*d.*, whereof he was convicted, as by the record and proceedings thereof, which have been duly transferred, under and by virtue of the said act, from our said Court of Great Session, into our said Court of *Exchequer* here at *Westminster*, and which still remain in our same Court of *Exchequer*, manifestly appears. And whereas after the recovery of the said judgment, and before any execution thereupon made, the said *John Waters* and *David Jones* became bankrupts, and one *Thomas Howell* and one *Thomas Scott* were appointed assignees of the estate and effects of the said *John Waters* and *David Jones*,

according to the several statutes concerning bankrupts, as we have been informed and given to understand: and now on behalf of the said *Thomas Howell* and *Thomas Scott*, as assignees as aforesaid in our said Court of *Exchequer*, we are informed that, although judgment was so given as aforesaid, yet that execution thereon still remains to be made to them, whereof the said *T. H.* and *T. S.* have humbly besought us to provide them, as such assignees as aforesaid, a proper remedy in this behalf; and we, being willing that those things which were rightly done in our said Court of Great Session, before the passing of the said act should have due execution, command you that, by honest men of your bailiwick, you should make known to the said *Henry Bowers* that he be before the Barons of our said *Exchequer* at *Westminster*, on the 3rd day of *November* next coming, to shew if he hath or can say any thing for himself why the said *T. H.* and *T. S.*, as such assignees as aforesaid, should not have execution against him upon the said judgment for the damages aforesaid, according to the force and effect of the said recovery, if it shall seem expedient to him so to do; and in what manner you shall execute this our writ, make known to the Barons of our said *Exchequer* at *Westminster*, on the said 3rd day of *November*, and have there the names of those by whom you shall so make known to him, and this writ; at which day, before the Barons of our said Court of *Exchequer* at *Westminster*, came here the said *T. H.* and *T. S.*, by *Wightwick Roberts*, their attorney; and the sheriff, to wit, *Thomas Morris*, esq., sheriff of the county, returned to the Barons of the said Court, that the said *Henry Bowers* had nothing in his bailiwick, whereby he could cause him to be summoned, and that he was not to be found in the same; and the said *H. B.* being solemnly demanded, comes by *W. L. Whitmore*, his attorney, and

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hereupon the said *T. H.* and *T. S.* pray that execution may be adjudged to them, as such assignees as aforesaid, of the damages aforesaid, according to the force and effect of the said recovery, &c.

Plea.—And the said *H. Bowers*, by *W. L. W.* his attorney, comes and says, that the said *T. H.* and *T. S.* ought not to have execution against him on the same judgment, because he says that the said judgment in the said Court of Great Session was recovered therein on and by default of the appearance of him the said *H. B.*, in and to an action of debt, commonly called debt on a *concessit solvere*; and that, by the rule and practice of the said Court of Great Session, established and prevalent in the said Court at and from the time of the commencement of the said action, until and at the time of the recovering of the said judgment therein, and from thence until the time of the passing of the said act of parliament, in case of judgment by default of the appearance of the defendant in an action of debt, commonly called debt on a *concessit solvere*, no valid execution could issue against the defendant upon such judgment, unless an affidavit had been previously made by the plaintiff in such action, before a judge of the said Court of Great Session, during the time of the Great Session, or before a person authorized by special commission for that purpose, during the vacation, on verification of the amount of the debt justly due from the defendant to the plaintiff in such action; and the said *H. B.* further says, that no such affidavit has ever been made by the said *J. W.* and *D. J.*, or either of them, pursuant to the said rule and practice of the said Court of Great Session, in verification of the amount of the debt justly due and owing from the said *H. B.* to the said *J. W.* and *D. J.* in the said action, in which the said judgment was so obtained by them against him as aforesaid; and this he the said *H. B.* is ready to

verify; wherefore he prays judgment if the said *T. W.* and *T. S.* ought to have execution on the said judgment against him the said defendant.

Demurrer.—And the said *T. H.* and *T. S.* say, that the plea of the said *Henry* by him above pleaded in bar, is not sufficient in law, and they shew to the Court here the following causes of demurrer, that is to say, that the said *Henry* has in his said plea pleaded mere matter of practice of the said Court of Great Session, the same not being pleadable in bar; and for that the said Court of *Exchequer* is not bound by, and will not take notice of, the practice of an inferior jurisdiction; and for that the said *Henry* has in his said plea attempted to raise an immaterial issue, inasmuch as, for any thing that appears to the Court here, the said *J. W.* and *D. J.* may yet make such an affidavit as is stated in the said plea to be necessary, according to the practice mentioned in the said plea, early enough to comply with the said practice; and for that the matter of the plea is prematurely advanced; and for that the effect of the act of parliament in the plea mentioned or referred to, was to give the said Court of *Exchequer* exclusive power and jurisdiction over the said suit, proceedings, and judgment, and exclusive discretion to regulate the issuing of execution thereon, and the proceedings in such execution; and for that it is at most discretionary with the said Court of *Exchequer*, and not compulsory, to require such affidavit as in the said plea is mentioned; and for that a non-compliance by the said *J. W.* and *D. J.* with the alleged practice in the said Court of Great Session, would at most furnish only ground for application to the said Court of *Exchequer*, when the said *J. W.* and *D. J.* should hereafter proceed to execute the said judgment without having previously made such affidavit as in the said plea is mentioned; and for that the said plea is in other respects defective and insufficient.

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Joinder in demurrer.

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Sir *W. W. Follett*, for the demurrer.—This is an attempt to plead the practice of the Court of Great Session to a *scire facias* in this Court. By the act of 11 Geo. 4 & 1 Will. 4, c. 70, s. 14, all suits and proceedings then depending in the Court of Great Session are transferred into this Court, and they are directed to be dealt with and decided according to the practice of this Court, or of the Court of Great Session; and by rule 4 of this Court, of *Michaelmas* Term, 1 Will. 4, it is ordered, that in case any interlocutory or final judgment shall have been signed in any of the said Courts abolished by that act, the plaintiff, on filing a certificate of such judgment, shall be at liberty to proceed thereon, in like manner as if judgment had been signed in this Court. When this case came before the Court on a former occasion, upon a plea of *null tiel record* to the *scire facias*, the question was, whether the suit was to be considered as depending, and the Court held that it was (a). The plaintiff is now proceeding according to the practice of this Court, and therefore the practice of the Court of Great Session cannot be introduced into this suit, nor can it be pleaded.

The Court then called upon

E. V. Williams, to support the plea.—This is a *scire facias* for the purpose of informing the Court why execution should not issue on the judgment. The plea does shew a reason why the Court should not allow execution, and great injustice may be done if the defendant is unable to avail himself of the fact there stated. It is admitted to be the practice of the Court of Great Session, that, before execution could issue, an affidavit of the amount of

(a) See the case, ante, Vol. 3, p. 805.

debt really due must have been made, and it was absolutely necessary that this should be done, because the judgment was for a nominal sum. This particular case has not been provided for by the act, and the question is, whether this Court will allow execution to be taken out for a nominal sum. It is not for the defendant to apply to this Court; it is the plaintiff who should have applied, and have had that done which was necessary to make his right to have execution complete. As to the objection that the practice of the Court cannot be pleaded, it has been held that it may, where the merits of the case are involved in it. In *Dudlow v. Watchhorn* (a), which was *scire facias* against bail upon their recognizance, they pleaded that no *ca. sa.* was duly sued, returned, and filed against the principal, according to the custom and practice of the Court, and it was held to be a good plea. So here, the plaintiff has no right to issue execution, without first making an affidavit of the debt: that is admitted by the demurrer, and the defendant therefore is entitled to judgment.

LORD ABINGER, C. B.—I am of opinion that the plaintiff is entitled to judgment. The defendant should have applied to the Court to know whether they thought, that, in this particular case, the practice of the Court of Great Session ought not to have been adopted in preference to the practice of this Court, as the act expressly leaves it to the discretion of this Court which practice shall be adopted. At present, the suit being in this Court, the plea is no answer.

PARKE, B.—There are two objections to the plea:—*first*, this is a mere matter of practice; and, *secondly*, the

(a) 16 East, 39, and see *Darling v. Gurney*, ante, Vol. 2, pp. 101, 234.

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act has expressly abolished the Courts of Great Session, and with them the practice of those Courts; a discretion being reserved to this Court only, (and not to the defendant), whether they will adopt in the particular suit as the practice of this Court, what formerly was the the practice of the Court of Great Session. The defendant should have made an application to the equitable jurisdiction of the Court. It cannot be said as a general rule, that all matters, as well legal as equitable, which shew that execution ought not to issue, can be pleaded to a *scire facias*.

ALDERSON, B.—I am of the same opinion. It has been thought by some, that there should be a writ of inquiry, even after a judgment in debt: but no injury need be apprehended in this case (a).

GURNEY, B. concurred.

Judgment for the plaintiff; and time for applying to the Court was refused.

(a) The judgment in the Court amount of a bill of exchange, of Great Session was for the with interest and costs.

GOODRICKE and Another v. TURLEY and Others.

A RULE *nisi* was obtained on behalf of the defendant's bail by *Archbold*, for setting aside the proceedings by the plaintiff against them on the bail-bond, on payment of costs, and upon the usual affidavits that bail above had been put in and perfected, and that the application was for the indemnity of the bail, &c.

Where a rule has been obtained on an affidavit which is defective, in not having a proper jurat, the party moving cannot, when cause is shewn, and the objection taken, remove the effect of it, by producing a fresh affidavit similar to the first, with a proper jurat; the proper way is to rewear the original affidavit, and the Court will enlarge the rule for that purpose, or allow the new affidavit to be filed.

J. Jervis, before shewing cause, took an objection to the affidavit on which the rule was moved. The affidavit was made by three persons, and their names were not inserted in the *jurat*, as required by an express rule of *T. T.* 1 *Geo.* 4.

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Archbold, in answer to this objection, produced another affidavit, which he said was precisely like the first, and containing no new matter, except that the *jurat* contained the names of all the deponents. He contended that he had a right to use this affidavit, on the authority of *Salloway v. Whorewood* (a), where, upon a rule to shew cause, several new affidavits being offered in support of the rule, the Court held that they might be received; and they took this distinction between affidavits containing new matter, and those which only confirmed what was alleged and sworn to in the affidavits used on moving for the rule; that, in the latter case, they might be used, but not in the former. The affidavit now produced is, in fact, nothing but a copy of the first affidavit properly sworn, the original being filed, so that it could not be got at to be re-sworn by the deponents, who reside in the country.

PARKE, B.—The officer says, that application ought to have been made to re-swear the original affidavit; and though the case cited is not misapplied, yet the modern practice is certainly different, because the party who shews cause must take an office copy of the affidavit filed, and then a new affidavit is brought forward by surprise, which the other party has not seen, and has had no opportunity of examining or comparing.

Archbold then applied for time to re-swear the original affidavit, which

(a) 2 Salk. 461.

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J. Jervis opposed, on the authority of *Phillips v. Hutchinson* (a), which was a motion to set aside a bail-bond; and on shewing cause, a preliminary objection was taken that the affidavit on which the rule was moved had not a proper title, and an application was then made to amend the affidavit, or enlarge the rule; but *Littledale, J.*, after taking time to consider, with respect to the proposed amendment, said, "I think that it cannot be made. How can you have an affidavit dated one day in support of a rule several days old, and which is supposed to have been granted on that affidavit? Great inconsistency would then appear. Then it is said, that the rule may be enlarged; there, also, the same objection will arise, because then it must be the original rule which is discharged, or made absolute." Ultimately, his Lordship discharged the rule without allowing an amendment or enlargement.

PARKE, B.—It appears to me, that there will be no inconsistency in allowing this rule to be enlarged, to give the bail an opportunity of having the affidavit re-sworn; to discharge the rule would be only productive of useless expense.

The other Barons, *BOLLAND, ALDERSON, and GURNEY*, concurred.

Rule enlarged, for the purpose of getting the affidavit re-sworn.

Archbold subsequently applied for leave to file the fresh affidavit, in lieu of re-swearing the original affidavit, the deponents living in the country, and the new affidavit being perfectly correct.

(a) Ante, Vol. 3, p. 20.

The Court granted the application.

On a subsequent day, the new affidavit having been filed, *J. Jervis* appeared to shew cause, and argued that the bail-bond should stand as a security, upon an affidavit that the plaintiffs had been prevented from going to trial; but it appearing that they had not declared *de bene esse*,

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The Court made the rule absolute merely on payment of costs.

Rule absolute.

ROBINSON v. BROOKSBANK.

CHANNELL moved to set aside a judgment and execution thereon for irregularity, on the ground that the *cognovit* on which the judgment was signed was given by the defendant, whilst in custody of a sheriff's officer, no attorney expressly named by the defendant being present on his behalf, and attending at his request, to inform him of the nature and effect of such *cognovit*. From the affidavits it appeared that *Clarkson*, an attorney, called at the defendant's house, and told him that a friend of his outside wished to see the defendant, who accordingly went out, and was then arrested by the sheriff's officer; that the three then went to a place five miles off, where the defendant's attorney lived, and the defendant sent from the inn where he was for the attorney, who happened not to be at home; that his clerk came, who proposed to put in bail, but, at the suggestion of the officer, a *cognovit* was agreed to be given, and the officer then said to the defendant, you will want an attorney; there is Mr. *Clarkson*, who has been just admitted, and he can make the *cognovit*, if you have no objection;" that the *cognovit* was prepared by *Clarkson*, and signed by the defen-

It is not necessary that the attorney who attends on behalf of a prisoner to explain and attest a *cognovit*, should make the declaration required by the rule of H. T. 2 Will. 4, c. 72, in writing on the *cognovit*.

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dant, and *Clarkson* then put his name to it, as attesting witness for the defendant, and as his attorney. He referred to *Walker v. Gardner (a)*, *Fisher v. Papanicholas (b)* and *Bligh v. Brewer (c)*.

PARKE, B.—In *Bligh v. Brewer*, the defendant went to the attorney's office; here, all he does is to acquiesce in *Clarkson's* acting for him. The earlier cases upon this subject have been qualified by the later cases.

Channell.—There is another objection to the *cognovit* that the attorney in the attestation does not declare himself, in writing, to be attorney for the defendant, and that he subscribes himself as such. In *Fisher v. Papanicholas*, it was thrown out by the Court that that was necessary.

PARKE, B.—I think there is nothing in the last objection; quite enough has been done here; a verbal declaration is sufficient. This case comes very close to *Bligh v. Brewer*; but you may take a rule on the first point.

BOLLAND, ALDERSON and GURNEY, Bs., concurred.

Rule refused as to the last point. The rule *nisi* upon the first point was afterwards abandoned.

(a) 4 B. & Adol. 371.

(c) Ante, Vol. 3, p. 266; 1 C.

(b) 2 Cr. & M. 215; ante, Vol. M. & R. 651.

2, p. 251, S. C.

DUCKWORTH v. FOGG.

In order to obtain execution on a judgment from the Court of Common Pleas at Lancaster, under the 4 & 5 Will. 4, c. 62, s. 31, it is necessary not only to have the certificate of the prothonotary, but also an affidavit that the defendant has removed his person or goods, or both, out of the jurisdiction.

TOMLINSON moved for leave to issue execution on a judgment obtained after verdict, in the Court of Common Pleas at Lancaster. He moved merely upon a certi-

ficate of the prothonotary of that Court, not having an affidavit of the removal of the defendant out of the jurisdiction, or of any search having been made after him, or his goods. The act, he said, only mentioned a certificate (a).

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Per Curiam.—You must have an affidavit of the removal of the defendant's person or goods out of the jurisdiction.

Rule refused (b).

(a) The 4 & 5 W. 4, c. 62, s. 31, enacts, "that whenever a plaintiff or defendant in any action or suit, in which judgment shall be recovered in the said Court of Common Pleas at Lancaster, shall remove his person, or goods, or chattels from or out of the jurisdiction of the said Court of Common Pleas at Lancaster, it shall and may be lawful for any of the superior Courts at Westminster, upon a certificate from the prothonotary of the said Court of Common Pleas at Lancaster, or his deputy, of the amount of final judgment obtained in any such action, to issue a writ or writs of execution

thereupon, for the amount of such judgment and the costs of such writ or writs and certificate, to the sheriff of any county, city, liberty, or place, against the person or persons, or goods of the party or parties, against whom such final judgments shall have been obtained, in such manner as upon judgments obtained in any of the said Courts at Westminster."

(b) See *Lord v. Cross*, 2 Ad. & Ell. 81, where it was held, that, upon an affidavit that the defendant has removed his person out of the jurisdiction, the Court will only allow execution against his person, and not against his goods.

LESTER, Assignee, &c., v. LAZARUS.

THIS was an action of debt by the plaintiff, as assignee of an insolvent debtor, for the amount of a bill of costs due to the insolvent, who was an attorney. The plea was,

An assignee of an insolvent attorney is entitled to recover the bills of costs due to the estate, without

delivering signed bills, according to the directions of the 2 Geo. 2, c. 23.

Whether a bill delivered by an attorney, without mentioning the Court in which the business is done, is a sufficient compliance with the 2 Geo. 2, *quære*. *Semble*, that it is.

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"never was indebted." An objection was taken at the trial, that the bill of costs which was delivered was insufficient, inasmuch as it did not specify in what Court or Courts the business was done. The objection was overruled, and the plaintiff obtained a verdict, with leave for the defendant to move to enter a nonsuit.

Mansel moved accordingly, and renewed the objection. He referred to a case of *Hill* against *Wills* (a) in this Court, where, upon the same objection being taken, this Court granted a rule *nisi*, but the rule never came on for argument; and also a case from the Northern Circuit, upon which the same point arose.

The Court having granted a rule *nisi*,

Mahon shewed cause.—The question whether it is necessary to mention the Court in which the business was done does not arise; the plaintiff in this action is suing as assignee of an insolvent debtor; he could only make out such a bill as he found in the insolvent's books, and therefore it might be impossible for him to state many particulars which would be necessary to be shewn, if the attorney himself was suing; the statutes requiring bills to be delivered nowhere mention assignees. The words of the 3 *Jac.* 1, c. 7, are, "that all attorneys and solicitors shall give a true bill unto their masters or clients, or their assigns, of all charges concerning the suits which they have for them, subscribed with his own hand and name, before such time as they or any of them shall charge their clients with the same fees or charges." In *Comb.* 348, it was held upon this statute, that an executor of an attorney might sue for fees without a signed bill having been delivered. The words of the statute 2 *Geo.* 2, c. 23, s. 23, which is intitled, "An Act for the better Regulation of

(a) Michaelmas Term, 1834.

Attorneys and Solicitors," are, "that no attorney or solicitor shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements, at law or in equity, until the expiration of one month or more after such attorney or solicitor shall have delivered to the party to be charged a bill of such fees, &c., which bill shall be subscribed with the proper hand of such attorney or solicitor respectively." Upon this act it was held in *Weston v. Poole* (a), that the words "attorney and solicitor" applied personally to him, and not to his executor, and that though a sixth was taken off the bill upon taxation, the executor was not liable for the costs. In *Penson v. Johnson* (b), indeed, the Court of Common Pleas did, in an action by an executor of an attorney, refer the bill to be taxed (c); but in the case of *Barrett v.*

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(a) 2 Stra. 1056.

(b) 4 Taunt. 724.

(c) In this case the motion for referring the bill to be taxed was opposed by Shepherd, Serjt., on the authority of two cases in Barnes's Notes:—*Lee*, executor, v. *Knight*, p. 119, where a motion to tax the bill upon bringing the money into Court was refused, because the plaintiff was executor; and *Chapman*, executor, v. *Chapman*, Id. 122, where a similar motion was made and refused, the Court saying "It is constantly denied here." These cases in the Common Pleas would have been a sufficient authority for that Court, in *Penson*, executor, v. *Johnson*, to have refused the rule: but the Court said, that, as the practice was otherwise in the King's Bench, they would act in conformity thereto, and they ordered the bill to be taxed. About this time, and for some years after-

wards, the Courts entertained an opinion that they had a general power over attorneys' bills, independently of the acts of Parliament, and could order any bill to be taxed or not, as they thought proper. This opinion was found, upon investigation, to have no foundation, and is now quite exploded. See the late case of *Doe d. Palmer v. Ros*, ante, p. 102, where Coleridge, J., takes an able review of the cases upon the subject of taxing attorneys' bills. It is plain, therefore, that the cases in Barnes had the law on their side: and as the Court of King's Bench has now overruled its former opinion; as the Courts have no authority to order a bill to be taxed, except under the statute; and as it has been expressly determined that executors are not within the statute, it follows that *Penson v. Johnson* cannot be supported.

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Moss (a) it was held by *Burrough, J.*, at *Nisi Prius*, that the act only applies to the attorney himself suing, and not to his executor, and that the latter might recover in an action, without proof of a bill delivered under the statute. The principle upon which those cases were decided applies equally to an action by an assignee. In this case it was proved that a bill was delivered signed by the insolvent, and the mere omission to specify in what Court the business was done, could not vitiate the bill, as it has been held that a mistake which is not calculated to mislead is not material.

Mansel, in support of the rule.—The statute of *James* expressly requires that the attorney shall give a true bill of charges concerning the suits which he has for the client, and subscribed with his own hand and name, before he shall charge his client with those charges; no debt, therefore, or right of action, accrued until that was done. The case of an executor is different, because there is a physical impossibility in the executor to comply with the act; but the assignee laboured under no such difficulty; the one is the act of God, the other the party's own act. The Insolvent Act puts the assignee in the same situation as the insolvent, and only transfers to the assignee the debts and rights, &c., of the insolvent, in the same state in which he had them: then it cannot be said that the bill delivered is a true bill of all the charges concerning the suits which the attorney has for the client, unless he distinguishes the suit, and specifies in what Courts the business was done, so as to make it plain and intelligible to the client.

PARKE, B.—I am of opinion that this case falls within the principle of those cases which have been referred to

respecting executors. The act of *Geo. 2* is only a personal prohibition on the attorney himself to sue, and an assignee is not within the act. It has been argued that no debt accrues until a bill has been delivered; but the words of the act are, that "*attorneys* shall deliver a true bill of charges before *they* shall charge their clients;" those words only apply to attorneys themselves, and deprive them of the right to sue until they have complied with the act; and if the argument was correct that no debt arises until a bill has been delivered, it would apply equally as well to executors, who have been held entitled to sue, though no bill has been delivered. Another objection has been taken respecting the form of the bill, which arises on the statute of *Geo. 2*, and not on that of *James 1st*. There is a difference in the language of the two acts: under the statute of *James I* I think there was a sufficient delivery of the bill. Upon the statute of *Geo. 2*, it has been held that executors are not comprised within it, because, unless it had happened that the testator had delivered a bill before his death, the executor could not have sued at all; the Courts therefore put a restricted interpretation on the words of the act. It is very true that an assignee is not under the same physical impossibility of complying with the act as an executor is, but a different construction of the act would sometimes impose insuperable difficulties upon assignees; as for instance, if an attorney should commit an act of bankruptcy by going out of the country; this case therefore falls within the same principle as that of an executor, and there is no reason why the same construction should not apply: and the question therefore does not now arise, whether this was a good bill under the statute of *Geo. 2*; if it is insufficient, it is just the same as if no bill at all had been delivered. It has been also held on the statute of *Geo. 2*, that it only extends to actions, and does not prevent the attorney from setting off the bill, though the requisites of the act have not been

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complied with. But it is unnecessary to decide whether this was a sufficient bill within the statute of *Geo. 2.* I think it was clearly a good bill within the statute of *James.*

BOLLAND, B.—I am of the same opinion. If the insolvent has omitted to do what is necessary by not signing the bill, there would be a failure of justice.

ALDERSON, B.—I see no reason why this should not be a good bill under the statute of *Geo. 2.*, merely because it does not state on the face of it in what Court the business was done. The words of the act do not expressly require it, and if it becomes material, there is nothing to prevent its being shewn by extrinsic evidence in what Court the business was done; but upon the other point, I entirely concur in opinion with my Brother *Parke.* An executor was held not to be within the acts, because it was impossible that he could comply with that part of the act which requires the proper hand of the attorney to be subscribed to the bill; does not that equally apply to the case of an assignee, as there is no provision in the Insolvent Act which empowers the assignee to compel the insolvent to sign the bill.

GURNEY, B.—The attorney becomes insolvent before he has delivered, or perhaps before he could have delivered, a signed bill. Though he can maintain no action, I am of opinion that a debt exists; and if this action had been by the attorney himself, I am not prepared to say that he would not have been entitled to recover.

Rule discharged with costs.

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RAMSDEN v. MAUGHAM.

BARSTOW shewed cause against a rule obtained by *Ball*, for setting aside a writ of *alias capias* with costs, for irregularity, and also that the defendant might be let out of custody. From the affidavits it appeared, that, on the 9th of *April*, 1835, a *capias* was issued into *Surrey* on a proper affidavit of debt: no arrest was made on this writ, and on the 10th of *May* another *capias* was issued into *Middlesex*, referring to the previous affidavit and *capias* into *Surrey*, but upon this writ no arrest took place. On the 5th of *November* an *alias capias* was issued into *Surrey*: and on the back of the writ was indorsed "affidavit filed in *Surrey*, *April* 9th, 1835." Upon this last writ the defendant was arrested. It was now contended, on the authority of *Rodwell v. Chapman* (a), that the arrest was regular: it was there held, that if a writ of *capias* be issued into one county on an affidavit of debt, and no proceeding be taken on it, another original writ of *capias* may be issued into another county on the same affidavit; and in *Coppin v. Potter* (b), where a *capias* had issued against a defendant upon an affidavit sworn before and filed with the deputy filacer for *Sussex*, but the defendant not being found there, the plaintiff, after the lapse of a month, caused an *alias capias* to be issued into *Cornwall*, by the same deputy filacer who acted for the county of *Sussex*, it was held that an arrest upon this latter writ was regular, though there had been no new affidavit of debt, nor an office copy filed on issuing the *alias*. In the present case, the same officer acted for both counties. The alteration in the writs by the Uniformity of Process Act does not prevent the plain-

An affidavit of debt sworn on the 9th of *April*, upon which a *capias* issued into *Surrey*, and afterwards another *capias* into *Middlesex*, and on the 5th of *November*, an *alias capias* into *Surrey*:—*Held*, that, as the same officer acted for both counties, an arrest upon the last writ was regular.

An affidavit is not considered stale till it is a year old.

(a) Ante, Vol. 1, p. 634; 1 Cr. & M. 70, S. C.

(b) Ante, Vol. 2, p. 785; 4 Mo. & Scott, 272; 10 Bing. 440, S. C.

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tiff having concurrent writs on the same affidavit running into different counties.

Ball, in support of the rule.—*Rodwell v. Chapman* was before the recent rules; and in *Coppin v. Potter*, the second was an *alias* writ, and not an original writ, as in the present case. The rule of *Michaelmas Term*, 3 *Will.* 4, ss. 6, 7, in which the forms of *alias* and *pluries* writs are given, evidently contemplates that second and subsequent writs should be issued as *alias* and *pluries* writs; for the rule directs that the *alias* writ shall refer to the preceding writ or writs. Here, upon a stale affidavit made upon the 9th of *April*, a writ is issued on the 5th of *November*. In *Baker v. Allen* (a), it was held that no fresh affidavit was necessary, because the second writ was issued as a continuance of the first.

PARKE, B.—An affidavit is not considered stale until it is a year old. *Rodwell v. Chapman* decides that the plaintiff may abandon the first writ upon which nothing has been done, and issue a new writ into another county upon the same affidavit, if made within a year, and before the same officer, who acts for both counties.

ALDERSON, B.—Where the same officer acts for both counties, it has been frequently held that the same affidavit will warrant process issuing into both counties. The rule must be discharged.

Rule discharged (b).

(a) 1 *Man. & Ry.* 232; 7 *B. & C.* 526.

(b) See *Dunn v. Harding*, 4 *Moo. & Sc.* 450; 10 *Bing.* 553, *S. C.*

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ROCK v. JOHNSON, a Prisoner.

PETERSDORFF shewed cause against a rule obtained by *J. Williams*, for discharging the defendant out of custody, on the ground of a defect in the *jurat* of the affidavit to hold to bail. It was objected in the first place that the application was too late, not having been made within the time allowed for putting in bail; and *Tucker v. Colgate* (a) was relied on, where it was held that as, if bail had been put in in due time, the defendant would thereby have been precluded from making such a motion, he ought not to be in a better condition by having neglected to put in bail in due time.

Williams, contra, relied upon the fact that a summons had been taken out at chambers as soon as the error was discovered; but principally, that the defendant, being a prisoner, was entitled to greater indulgence.

LORD ABINGER, C. B.—If bail had been put in, the defendant would have been precluded from this objection: but it is different, where the defendant is still in prison.

PARKE, B.—Is there any case which applies the strict rule as to time to prisoners (b)? It has been usual not to be so strict with them.

Petersdorff.—The affidavits in answer to the rule give a sufficient answer to the objection on which the rule was moved; for it appears, that, before the writ issued on which

Where a writ of *capias* was issued on a good affidavit of debt, and afterwards another *capias* into another county upon a defective affidavit, on which the defendant was arrested:—*Held*, that the arrest was regular, as the first affidavit, being sworn before the same officer who issued both writs, would warrant the issuing of the second writ without a fresh affidavit.

Semble, that prisoners are not bound by the same strictness as to the time for making objections, as applies to persons at large.

(a) 2 Cr. & J. 489; ante, Vol. 1, p. 350; *Wilson v. Bacon*, Id. 450; p. 574, S. C. *Mortimer v. Pigott*, Id. 615; *Pasmore's bail*, Vol. 3, p. 214, and

(b) See as to this point, *Primrose v. Baddely*, ante, Vol. 2, *Davis v. Green*, there cited.

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the defendant was arrested, a prior writ had been issued, founded upon a good affidavit, dated *October 26th*, a copy of which is annexed. The defendant not having been arrested upon the first writ, the plaintiff was at liberty to issue another writ into another county, without a fresh affidavit, it being sworn that the same officer acts in this Court for all counties, according to *Rodwell v. Chapman* (a); and *Ramsden v. Maugham* (b), decided in this Court a few days since, was to the same effect. The insufficiency of the second affidavit could not make the arrest on the second writ bad, when no affidavit at all was necessary.

Williams, in support of the rule.—If there had been concurrent writs, they might have been regular, but here the first writ was issued into *London*, grounded on an affidavit, and nothing was done upon it. The second writ, on which the defendant was arrested, was a new writ into *Middlesex*, on a new affidavit, without any reference to the former writ. The first writ and affidavit must therefore be considered as abandoned. The rule of *Michaelmas Term*, 2 *Will.* 4, s. 6 (c), gives the plaintiff leave to issue an *alias* or *pluries* writ of *capias* into another county, but expressly directs that the *alias* or *pluries* writ shall refer to the preceding writ or writs as directed to the sheriff to whom they were in fact directed: and in *Dunn v. Harding* (d), *Tindal*, C. J., makes a distinction between concurrent writs and *alias* writs: he says, “concurrent writs do not injure the defendant, as he can only be arrested once, and will only be liable to the costs of the writ on which he was arrested. The rule to which reference has been made, only refers to cases where an *alias* is sued out on the return of the first writ, and

(a) 1 Cr. & M. 70; ante, Vol. 1, 634, S. C.
 (b) Ante, p. 403.

(c) Ante, Vol. 1, p. 471.
 (d) Ante, Vol. 2, p. 803.

not to those where concurrent writs are issued into different counties." Here the first writ was clearly abandoned : or if not, the second writ ought to have been an *alias*, and to have referred to the former writ.

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The Court were of opinion that the proceedings were regular ; and the opinion of BOLLAND, B., to the same effect, having been already given at chambers, they ordered the rule to be discharged with costs.

Rule discharged with costs.

REX v. RAWLINGS.

THIS was an application to the Court for leave to substitute the name of a sub-purchaser for that of the original purchaser of some property sold by the Crown, under certain extents issued against the defendant. It appeared from the affidavits, that, in 1822 and 1823 several writs of extent issued against the defendant for the recovery of certain sums due from the defendant to the Crown ; and, upon certain inquisitions which had issued thereon, he was found to be seized in fee of certain property in *Berkshire*, which was afterwards put up to sale in lots by auction, by an order of the Court of *Exchequer*, of *November 25th, 1823*, pursuant to the directions of the *25 Geo. 3, c. 35* ; and that at the sale before the deputy remembrancer of this Court, on the 14th of *November, 1828*, and that *William Hand* then became the purchaser of certain lots, which, with the timber, &c., amounted to *9743l. 15s.*, which was soon afterwards paid into the Bank of *England*, in trust in this cause, but before any conveyance had been made

An extent having issued against the defendant, certain freehold property was seized and sold under the *25 Geo. 3, c. 35*. The purchaser having paid the purchase-money into the Bank, afterwards, and before any conveyance was executed, sold the property to another person for a less sum, and, in order to avoid the necessity of paying the *ad valorem* duty on two conveyances, applied to the Court that the sub-purchaser's name might be substituted in the conveyance for that of the

original purchaser. The Court declined to grant the application, unless with the consent of all parties; which was afterwards obtained, and an order made.

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or executed to him, he agreed to sell the property to the Rev. *Henry Pole*, at the reduced price of 8500*l*. The object of the application was to save the expense of two sets of stamps. Notice was given to all parties concerned.

Boteler, for the purchaser, *William Hand*.—The words of the act are, that “when a purchaser or purchasers shall be found, the conveyance of the lands, tenements, or hereditaments so decreed to be sold, shall be made to the purchaser or purchasers by his Majesty’s remembrancer in the said Court of *Exchequer*, or his deputy, under the direction of the said Court, by a deed of bargain and sale to be inrolled in the same Court; and that from and after the making such conveyance, and the inrolment thereof as aforesaid, the bargainee or bargainees in such conveyance, and his or their heirs, executors, administrators, and assigns, shall have, hold, and enjoy the lands, tenements, and hereditaments therein comprised, for his and their own respective use and benefit.” The act ought to receive a liberal construction.

PARKE, B.—You ask for a liberal construction of the act against the revenue, to construe “purchaser” to mean “sub-purchaser.” The words of the act support that argument, for they appear to contemplate the possibility of some one else than the first purchaser taking the conveyance.

Boteler referred to a case of *Ex parte Macdougall*, where, under similar circumstances, the name of a Mr. *King*, a sub-purchaser, had been substituted for that of *Macdougall*; and he said that he understood that it was a common practice.

Poole, for the sub-purchaser, *Henry Pole*, expressed

his readiness to agree to the order, if the Court had the power to make it. He submitted, that, on the words of the act, the conveyance could only be to the real purchaser, and not to a sub-purchaser. Even under powers of sale a doubt has arisen how far a conveyance to uses to bar dower would be good. The usual way is to take a conveyance to a trustee, which recites that the trustee is a purchaser for the benefit of the real party; this mode was approved of in *Howard v. Ducane* (a), where the question arose; but if that mode were adopted, it would not do to recite that the trustee was acting on behalf of *Hand*, as it would still be necessary to have two conveyances. Another difficulty arises from a direction in the act that "all monies which shall become payable from any such purchaser or purchasers, as aforesaid, shall be paid, accounted for, and applied, towards the discharge of the debt due to the Crown, and of all costs and expenses which shall be incurred by the Crown in enforcing the payment of such debt, in such manner as the said Court of *Exchequer* shall from time to time order and appoint." If *Pole*, therefore, is substituted for the original purchaser, his purchase-money, instead of being paid into the hands of the Crown, towards the discharge of the Crown debt, will go into the pocket of *William Hand*. There are no words in the act authorizing a conveyance to the assignee.

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LORD ABINGER, C. B.—There is a difficulty in granting this application, and, if we were to do so, the title of the purchaser would not be secure. In the case cited there seems to have been a trustee introduced. The safer way is to get the consent of the Attorney-General, and of all other parties, to the substitution of Mr. *Pole's* name in the conveyance for that of Mr. *Hand*.

(a) Turn. & Russ. 81.

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The following order was afterwards made by consent :—

“ It is ordered that the said *Henry Pole* be substituted and declared the purchaser of the mansion-house, estate, and premises, comprized in lots Nos. 1 and 4 of the estate in question in this matter, in the place and stead of the said *William Hand*; and that upon payment by the said *Henry Pole* to the said *William Hand* of the sum of 8500*l.*, the said *Henry Pole* do retain possession of the said mansion-house, estate, and premises, and be entitled to the rents and profits thereof from the 25th day of *December* last : and it is further ordered, that, upon such payment being made, the tenant or tenants of the said estate and premises do respectively allow and pay their future rent or rents to the said *Henry Pole* or his assigns, to and for his sole use; and that the remembrancer of this Court, and all other proper and necessary parties, do join in and execute proper conveyances and assurances of the said estate and premises to the said *Henry Pole*, his heirs and assigns, as the purchaser thereof, or to such other person or persons as he, the said *Henry Pole*, may direct, in the stead and in lieu of the said *William Hand*, such conveyances and assurances to be settled by the said remembrancer; and that, in the said conveyances, or one of them, the sum of 9853*l.* 15*s.*, paid into the bank to the credit of this matter for the said lots, be expressed to be the consideration for the said estate and premises. And it is further ordered, that all title-deeds, evidences, and writings relating to the said premises, in the custody or power of the said *William Hand*, be delivered to the said *Henry Pole*, or to whom he shall direct, and that the said *Henry Pole*, his heirs and assigns, have the benefit and advantage of the purchase by the said *William Hand*, of the said mansion-house, estate, and premises, and of all orders, reports, and other proceedings made and taken in the said matter, relating to the same; and further, that the said *Henry Pole* be at liberty, either in his own name,

or in the name of the said *William Hand*, to have, use, and take all such further and other acts and proceedings in this Court, and otherwise, as may be requisite and necessary for completing the said purchase on his behalf, in the place and stead of the said *William Hand*, and for fully and effectually vesting the fee-simple and inheritance of the said mansion-house, estate, and premises, in the said *Henry Pole*, his heirs and assigns, or such person or persons as he may direct or appoint."

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TUCKER v. BRAND.

C. C. JONES, on behalf of the plaintiff, applied for leave to enter an appearance for the defendant, the *distingas* having been issued, and the sheriff having returned that he had levied 40s.

PARKE, B.—I think that no rule is necessary where the sheriff has returned that he has levied on the defendant's goods.

Rule refused (a).

(a) See *Page v. Hemp*, ante, p. 203; and *Johnson v. Smealey*, Vol. 1, p. 526.

Where leave to issue a *distingas* has been obtained against the defendant for not entering an appearance, upon which the sheriff has returned that he has levied 40s., no rule is necessary previously to entering a common appearance.

ROGERS v. BANGER.

C. C. JONES, on behalf of the defendant, moved that the plaintiff might be ordered to give security for costs under these circumstances:—after the defendant was arrested, the plaintiff removed his furniture, and it was sworn that he had run away to avoid a charge of bigamy. Notice had been served on his attorney, who said that the plaintiff had absconded, and that he (the attorney) therefore should not resist the application for security.

After an arrest of a defendant, the plaintiff removed his furniture, and absconded, to avoid a charge of bigamy:—*Held*, that the defendant was entitled to security for costs.

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GURNEY, B.—I think this is a case in which I ought to compel security for costs.

Rule granted, and which was subsequently made absolute, no cause being shewn against it.

DOE *d.* BISHTON and Others *v.* HUGHES and Others.

In ejectment against twelve defendants, they defended jointly, and entered into a joint consent rule for part of the premises mentioned in the declaration, but not specifying particularly what part. At the assizes two of the defendants were allowed, by order of the Judge, to suffer judgment by default, and the other ten defendants, without the consent rule being altered, defended for certain parts of the property in their respective occupations, and got a verdict. The Court, however, held, that the verdict must be entered generally for the plaintiff, as the defendants did not establish a right to any property in the possession of the twelve, and that the plaintiff was entitled to the general costs of the cause, but that the ten defendants were entitled to their costs of defence, to be deducted from the plaintiff's costs.

THIS was an ejectment by the lessors of the plaintiff, as mortgagees, and they had delivered, in pursuance of a Judge's order, a very full particular of property to a considerable extent. The defendants, twelve in number, were respectively tenants of certain messuages, &c., forming but a small part of the property sought to be recovered. The defendants jointly entered into the usual consent rule "for part of the premises in question; which part they the said *Hugh Hughes*, &c., (naming all the defendants), hereby admit to be or consist of fifty messuages, &c., 500 acres of land, &c., with common of pasture, &c., situate in the parish of *Llanbeblig*, in the county of *Carnarvon*, and also of fifty other messuages, &c., 500 acres of other land, &c.; (the consent rule repeating the property as set forth in the several counts of the declaration, but confining the quantity to half the amount there claimed)." At the Assizes, before the cause came into Court, an application was made to Mr. Baron *Bolland* on behalf of two of the defendants, that they might be at liberty to withdraw their plea, and suffer judgment by default, and that the record should be amended accordingly: this was opposed on the part of the plaintiffs, but the learned Baron granted the application on payment of costs. At the trial the plaintiffs claimed to enter a verdict

against the two defendants who did not appear, for not confessing lease, entry, ouster, and possession. The other ten defendants had a verdict as to certain parts of the property of which they were respectively in possession, and as to which the lessors of the plaintiffs failed in establishing their right. Liberty, however, was given by the learned Judge to the lessors of the plaintiff, to move to enter a verdict for the plaintiff with 1*s.* damages. A rule *nisi* for this purpose was obtained in the following term, and, after argument, was made absolute, upon the ground that, as the consent rule remained unaltered, the plaintiff was entitled to recover in respect of the same premises for which the twelve defendants jointly consented to defend. On a subsequent day—

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Tomlinson obtained a rule *nisi* to amend the *postea*, by entering the verdict for the plaintiff as to all but ten messuages, and for the ten defendants as to those ten messuages, and that the costs of defending for those ten messuages be allowed to those defendants, and deducted from the plaintiff's costs. The lessor of the plaintiff having proceeded for all in the possession of the defendants, and the defendants having defended as to all, and succeeded as to ten of the messuages, he contended that this case came within the principle of the rule 74 of *H. T. 2 Will. 4 (a)*, "that no costs shall be allowed to a plaintiff upon any counts or issues on which he has not succeeded, and that the costs of all issues found for the defendant shall be deducted from the plaintiff's costs."

John Jervis shewed cause.—The plaintiff, having succeeded as to part of the premises, is entitled to a general verdict, upon which he takes, at his peril, the possession of those premises only to which he is really entitled. Non constat that the plaintiff went for more.

(a) Ante, Vol. 1, p. 193.

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PARKE, B.—The practice certainly was so when the rule as to costs was different.

GURNEY, B.—It appears by the Judge's notes, that the plaintiff proceeded for all in the possession of the defendants.

John Jervis.—*Doe d. Blair v. Street* (a) is an express authority against this motion. There a verdict in ejectment had been obtained against *A.* and *B.*, who defended for different parts of the premises in the declaration. The Court afterwards set aside the verdict as to *A.*, and an application being afterwards made to amend the *postea*, by confining the verdict as against *B.* to those premises for which *B.* specifically defended, the Court refused to allow it to be done. The verdict in ejectment is always general, to recover the term, with 1*s.* damages. The consent rule here was general, for 500 acres, &c., part of the premises mentioned in the declaration, instead of particularly specifying the closes by metes and bounds, by which the plaintiff would have been enabled to know for what in particular they defended, and the plaintiff might, perhaps, have entered a *nolle prosequi* as to those particular messuages in the possession of the defendants. The defendants, therefore, have brought the inconvenience upon themselves, and the verdict ought to be general.

LORD ABINGER, C. B.—Where the verdict is general, the plaintiff, at his peril, takes no more than he is entitled to; but there have been many instances within my own knowledge, where the verdict has been specifically for part. Here, there was a verdict for ten defendants, for particular parts of the premises. It is only in modern times that the consent rule has specified the premises defended for.

(a) 4 Nev. & M. 44.

Tomlinson, in support of the rule.—If the consent rule had been more specific, these defendants would have had a verdict, upon which they would have been entitled to the general costs of the cause. They will, therefore, be sufficiently punished for not having entered into a proper consent rule.

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Per Curiam.—The verdict must be entered for the lessors of the plaintiff for 1*s.*, but the execution must be confined to the premises in the possession of the two defendants who suffered judgment by default. The plaintiff will be entitled to the general costs of the cause; the ten defendants having their costs of defending for that part of the property as to which they succeeded deducted from the plaintiff's costs.

Rule absolute accordingly.

NOEL *v.* BOYD.

ASSUMPSIT.—The declaration alleged, that one *Charles Henry John Rich* drew a bill of exchange for 100*l.* upon the defendant, who accepted the same; that *Rich* indorsed it to *Newton*, who indorsed it to *John Lewis*, who indorsed it to the plaintiff. The defendant pleaded, that he accepted the bill for the accommodation

To a declaration on a bill of exchange by an indorsee against the acceptor, the defendant pleaded a special plea, shewing fraud on the part of the drawer and the

subsequent indorsees, and alleging that the plaintiff took the bill, with a knowledge of those facts; and concluded by averring, that the plaintiff was not a *bond fide* holder of the bill for value. The plaintiff replied, that he was a *bond fide* holder of the bill for value. At the trial a witness was called for the plaintiff, who proved that he applied to him to discount the bill, and that the plaintiff gave him the money for it, upon his putting his name on the bill as indorser. The learned Judge left the case to the jury, upon the credibility of the witness, and upon the question, whether it was a *bond fide* transaction on the part of the plaintiff; observing that the allegations of fraud, as stated in the plea, were admitted by the replication. The jury having found for the defendant, *Alderson* and *Gurney*, B*s.*, on a motion for a new trial, held, that the jury were warranted in their finding, and that the verdict ought not to be disturbed. *Parks* and *Bolland*, B*s.*, thinking that the jury might have been misled by the observations of the learned Judge as to the effect of the admission on the record, were of opinion that the case ought to be submitted to another jury.

Quære, whether, in an action of *assumpsit*, where the plaintiff does not reply *de injuria* generally to the facts stated in a plea, the circumstance of his only taking issue on one of them entitles the jury to treat the facts alleged in the plea, and not denied in the replication, as admitted.

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of the said *C. H. J. Rich*, and without any value or consideration, and that the said indorsement by the said *C. H. J. Rich*, in the said first count mentioned, was an indorsement in *blank*, and that the said *C. H. J. Rich* never delivered the said bill to the said *M. Newton*, but that he delivered it to one *Lewis Levy*, and the said *Lewis Levy* then received, and from thence until one *Lawrence Levy*, as hereafter mentioned, first became possessed thereof, held the same for a specific purpose, for the sole use and benefit of the said *C. H. J. Rich*, and not otherwise, to wit, for the purpose and in order that he, the said *Lewis Levy*, might get the bill discounted for the said *C. H. J. Rich*, and that he should deliver and pay the proceeds thereof upon such discounting to the said *C. H. J. Rich*, and of all which the said *Lawrence Levy*, before and at the time when the said bill was delivered to him as hereafter mentioned, had notice; and the said defendant further saith, that the said *Lewis Levy* fraudulently and covinously, in violation of good faith, and contrary to the said purpose for which he received the said bill, afterwards, to wit, on the 12th day of *October*, 1834, delivered the same to the said *Lawrence Levy*, and the said *Lawrence Levy* took and received the same from the said *Lewis Levy*, upon other and different terms, and without discounting the same for the said *C. H. J. Rich*, and contrary to the said special purpose, and in breach and violation thereof, to wit, for the purpose, and under colour and pretence of securing a debt then alleged to be due from the said *Lewis Levy* to the said *Lawrence Levy*; and the said *M. Newton*, *John Lewis*, and the plaintiff, before and at the said time when the said bill was so indorsed to them respectively as aforesaid, and when they first respectively received the same, had notice of the premises aforesaid; and the defendant in fact saith, that no consideration or value whatever, except as aforesaid, hath been given or had or received to or by the said

C. H. J. Rich, or to or by any other person on his behalf, or at his request, for or on account of the said indorsement of the said bill by the said *C. H. J. Rich*; and further, that the plaintiff hath not been nor is the *bond fide* holder of the said bill for any value or consideration made, done, or given by him in that behalf; and this the defendant is ready to verify, &c.

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Replication.—That the plaintiff was and is the *bond fide* holder of the said bill in the said first count mentioned, for value and consideration given by the said plaintiff in that behalf.

The cause was tried before *Gurney, B.*, and at the trial the bill was produced. *John Lewis* was called by the plaintiff, to prove that he discounted the bill, and gave the witness the amount, *minus* the discount. Upon his cross-examination he admitted that he was an articled clerk to *Mr. Spyer*, an attorney, and was a brother of *Levy*, the sheriff's officer; that *Newton*, who was also an attorney, and cousin of the witness, gave him the bill to get discounted; that he had no interest in the bill, though he put his name to it; that the plaintiff gave him the amount, partly by two checks, and the residue in money, on different occasions; no witness was present. One check was put in. This was all the evidence. The counsel for the defendant, in his address to the jury, dwelt upon the circumstances detailed in the plea, as being admitted to be true; and the learned Judge, in summing up, directed the jury that the facts stated in the plea, not denied by the replication, must be taken to be true; and he left it to the jury, upon the credit of the witness, to say whether the transaction on the part of the plaintiff was *bond fide* or otherwise, but distinctly telling them that, if they believed the witness, to find a verdict for the plaintiff. The jury found for the defendant.

Humfrey having obtained a rule *nisi* for a new trial,

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on the grounds of the verdict being against evidence, and of a misdirection on the part of the learned Judge—

Crowder shewed cause, and contended that the question was one peculiarly fitted for the consideration of the jury, depending as it did entirely upon the credit of the witness *Lewis*. Neither has the defendant any right to complain of the observations made on the plea, as the plaintiff might have put all the facts in issue, by a replication of *de injuria*. [*Parke*, B.—No.] It was held, in *Noel v. Rich* (a), that a replication in the nature of *de injuria* would be good. [*Parke*, B.—That makes all the difference.]

Humfrey, in support of the rule, contended that fraud was not to be presumed against the holder of a bill of exchange; and that, as it had never been decided that a plaintiff might put in issue all the facts stated in the plea, it would be extremely hard upon a plaintiff, suing upon a bill of exchange, where a fictitious plea was pleaded by the defendant, if all the facts stated in that plea were to be taken as true, merely because the plaintiff, in accordance with the rules of pleading, had only put in issue one material fact; and that, as it was impossible to say what effect the observations of the learned Judge may have had upon the jury, there ought to be a new trial.

The Court took time to consider of their judgment, and on a subsequent day—

PARKE, B., said that the question had been considered by the Court, and that, as the jury might have been misled by the observations made by the learned Judge at the trial as to the effect of certain admissions in the plea, and that they might have supposed that those facts stated

(a) Ante, p. 228.

in the plea, and not denied by the replication, were to be considered as true in fact, he should be better satisfied if the case were submitted to another jury. He said he took the rule of law to be, that a transaction must be taken to be *bond fide*, until the contrary was proved; and that, as the defendant had called no evidence to impugn the evidence given by the plaintiff, it appeared to him that there was not sufficient ground to warrant the jury in finding for the defendant; and that *Bolland, B.*, thought with him, that the case ought to be submitted to another jury; but that, as the Court were equally divided in opinion, there would be no rule.

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ALDERSON, B., said that he retained the opinion he had formed at the time of the argument, that there was sufficient to warrant the jury in finding that the transaction was not *bond fide*; that the bill was fraudulently obtained, must be considered to be involved in the issue; that the jury were the proper judges of the credibility of the witness *Lewis*; that no account was given why *Noel* should have selected *Lewis* for putting his name on the bill, or why *Newton*, who was a very material witness, was not called; and therefore, on the whole, he was of opinion that the verdict ought not to be disturbed.

GURNEY, B., coincided in opinion with *Alderson, B.*, and said that he was satisfied with the verdict.

The rule therefore fell to the ground.

DAVIS v. LANE.

WORDSWORTH moved for a rule to shew cause why the name of the defendant's present attorney should not

Where an attorney has been appointed to receive certain

monies in furtherance of trusts pursuant to the provisions of the Lords' Act, the Court will not deprive him of that trust unless some ground is shewn for considering him unfit to fulfil it.

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be substituted in a rule of this Court of *Easter Term* last, for the name of the defendant's then attorney. The usual Judge's order for changing the attorney had been duly obtained. The defendant had been brought up under the Lords' Act, and it then appearing that he was entitled to an allowance from the Court of *Chancery* in respect of some property which was in litigation in that Court, and that such allowance was paid to the defendant by Mr. *Bird*, who had been appointed receiver of the estate, this Court had in *Easter Term* made a rule, all the parties being before it, directing that Mr. *Bailey*, the then defendant's attorney, should receive from Mr. *Bird* 100*l.* a year out of the allowance in question, for the purpose of defraying certain costs in bringing the defendant up under the Lords' Act, and also of satisfying his creditors. The purpose of the present application was, it was alleged, in furtherance of the object contemplated by the Court in making the rule before mentioned, by substituting the defendant's present attorney, a Mr. *Florance*, for the former one, Mr. *Bailey*.

Sed per Curiam.—Without having all the parties before the Court, we should not be justified in transferring the trust confided to the former attorney to a new one, merely because the attorney has been changed, unless we saw reason for believing that the first attorney would not perform the trust reposed in him.

Rule refused.

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SMEDLEY v. JOYCE.

DEBT.—The declaration was for work and labour as an attorney, money paid, &c.

Plea.—The defendant says that he *never did owe* to the plaintiff the said sum of 800*l.* as in the declaration alleged, or any part thereof, in manner and form, &c.; and of this he puts himself upon the country.

Special demurrer.—That the plea is defective, because, according to the rules of *Hilary Term 4 Will. 4*, the plea should have alleged that the defendant *never was indebted* in manner and form, &c.; and also because it is argumentative, for not distinctly showing whether it goes only to the original existence of the debt, or whether it also refers to its continuance.

The plea being pleaded near the end of the term, the Court, on the plaintiff's application, ordered it to be set down for the last paper day in the term (*November 23rd*); though, regularly, it could not have come on till the next term.

Mansel, in support of the demurrer, was stopped by the Court.

Currington, in support of the plea.—The second rule (a), under the head of "covenant and debt," is, that the plea of *nil debet* shall not be allowed in any action. The plea of *nil debet* is in this form—"that the defendant *does not owe* the said sum above demanded." The present plea is therefore not the old plea of *nil debet*, which is prohibited, but more like the new form given by rule 3 (b), the words of which are, that the defendant may plead "that he never was indebted in manner and

A plea of the general issue in debt on simple contract, must be in the form given by rule 3, tit. "covenant and debt," of the rules of *Hilary Term 4 Will. 4*, and therefore a plea that the defendant "never did owe," was held bad on special demurrer, the form being "never was indebted."

(a) Ante, Vol. 3, p. 323.

(b) Ib. p. 324.

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form as in the declaration alleged." The rule is only directory, and not obligatory; and the present plea being that he "never did owe," it is in fact the same in substance and meaning as that recommended by rule 3; "owe" and "indebted" are convertible terms, and therefore the plea is clearly a good answer to the action, and, not being an infringement of either of the rules, the demurrer cannot be supported.

The Court, however, expressing a clear opinion that the terms of the rule ought to have been strictly complied with—

Carrington applied for leave to amend, which the Court granted, only on the terms of a positive affidavit of merits being produced on the following day; otherwise,

Judgment for the plaintiff (a).

(a) That there is a material difference between the issue raised by the words "never was indebted" and the old words "does not owe," appears from a case of *Brown v. Daubeny*, in the King's Bench Bail Court, Hilary Term, 1836, *post*, where, to a plea of set off, the plaintiff in his replication used the new form of "never was indebted," instead of "never did owe." The plaintiff under that issue wished to prove that the sum, or part of the sum claimed by the set off, had

been paid: the secondary refused to receive the evidence, on the ground that it did not apply to the issue; and upon an application to the Court, on the ground of misdirection, *Patteson, J.*, held that the secondary's direction was right.—It should be recollected that the new rules have proscribed only the *plea* of nil debet, and not the *replication* of nil debet to a plea of set-off, which is still the proper form of such a replication. See *Chit. Pleading*, Vol. 3, p. 1158.

EARDLEY v. STEER.

ERLE, in *Easter Term*, obtained a rule *nisi* for setting aside an award made between these parties. From the agreement entered into between them, it appeared that the plaintiff had lately commenced an action for the recovery of 2000*l.*, alleged to be due on the balance of accounts. That the defendant alleged that he had a set-off against the plaintiff, and that the plaintiff would be found indebted to the defendant. That various disputes had arisen respecting the accounts, and that they had agreed to refer the action and all other matters in difference from the year 1813, to the award of *William Luke Ponsford*, accountant, and *George Hayman*, coach-builder, and such third person as they should appoint before the reference, so that the said arbitrators, or any two of them, should make their award before a certain day; the articles of agreement then provided for the delivery of particulars of demand on both sides, the production of all papers, &c., and that the parties were to be examined on oath, if two of the arbitrators thought proper; and it was then provided that the arbitrators, or any two of them, were at liberty to receive and allow as evidence all such writings, documents, and evidence, as they should think reasonable and proper, notwithstanding the same might not be receivable in evidence according to the strict rules of law or equity, and that the costs of the action, and also the costs of the reference and award, and all other costs, charges, and expenses incidental thereto, should abide the event of the award. The arbitrators, in pursuance of the submission, appointed *Thomas Flood*, esquire, umpire; the award was made by *Flood* and *Hayman* only, and, after reciting that all three

An action having been brought for the recovery of a sum of money, but which had only proceeded as far as the writ and appearance, and the defendant claiming a larger sum to be due to him, it was agreed that the action and the disputes arising out of the accounts and other matters in difference should be referred, the costs of the action, of the reference, and of the award, to abide the event of the award. The arbitrators awarded that the action should cease, and be no further prosecuted, and that on the balance of all accounts there was a sum of 661*l.* due to the defendant from the plaintiff, which they ordered him to pay on a particular day:—*Held*, that the award was sufficiently final, and decided the event of the action, to prevent the plaintiff setting it aside, though

perhaps the Court would refuse an attachment.

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had taken upon them the charge of the award, and had been attended by the parties, and had heard, examined, and considered the allegations and evidence of both parties and their witnesses, upon oath, proceeded thus: "we do award, order, and determine, that the said action commenced by the said *Edward Eardley* against the said *Joseph Steer*, shall cease, and be no further prosecuted; and we do find and award, that, upon the balance of all the accounts between the said parties which have been exhibited to us, there is due from the said *Edward Eardley* to the said *Joseph Steer*, the sum of 660*l.* 14*s.* 11*d.*; and that the said *E. E.*, his executors and administrators, shall and do pay to the said *J. S.*, his executors and administrators, the said sum of 661*l.* 14*s.* 11*d.*, at the *Old London Inn*, in the county of the city of *Exeter*, on *Monday* next, the 9th of *February* instant, at 12 o'clock at noon." The affidavits in support of the rule were made by *William Luke Ponsford*, one of the arbitrators, and *William Tucker*, the plaintiff's clerk. The rule *nisi* was obtained on four grounds, which were thus stated in the rule—*first*, that the award was not final, as it did not decide the event of the action for either party; *secondly*, that meetings were held by two of the three arbitrators, without the knowledge or presence of the third; *thirdly*, that the award was the decision of one of the arbitrators only, upon some of the questions referred; and *fourthly*, that there was partiality and injustice in the arbitrators. Upon the first point *Leaming v. Fearnley* (a) was cited.

Sir *William Follett* and *Newman* shewed cause.—The arbitrators have in fact found that the set-off was larger than the plaintiff's claim; the action therefore was decided, and the first objection, that the action was not determined, fails. *Leaming v. Fearnley* (b) is not an authority for the

(a) 5 B. & Adol. 403.

(b) 5 B. & Adol. 403; 2 Nev. & Man. 232, S. C.

plaintiff; that was a replevin suit, and all matters in difference touching the distress were referred, the costs of the suit to abide the event of the award: the award was, that the action should cease and be no further prosecuted; that 6*l.* were due for rent at the time of the distress, which sum the plaintiff was to pay to the defendant; that the defendant was to pay the costs of the award; and that, upon those payments being made, the parties were to execute mutual releases: there the costs being to abide the event of the action, it was necessary that the award should shew that the action was finally determined in favour of one or other of the parties; and it was held, upon that ground, that the award was not final; but here, the costs of the action are to abide the event of the award, and therefore they clearly fall upon the plaintiff, in whose favour the award is made, particularly as all matters in difference were referred.

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PARKE, B.—Is not the meaning of the agreement “to abide the event of the award *quoad* the action?” There might have been ten different matters in dispute—some decided in favour of one party, and some for the other. How were the costs to go?

Follett and Newman.—All matters in difference are referred, and “the costs of the action, the costs of the reference, and all other costs, are to abide the event of the award.” All the matters in dispute were matters of account, and therefore were all comprised in the action. The cause had not reached verdict. The arbitrators had no power to order a verdict to be entered. There was not even a plea—only a writ sued out, to which the defendant had appeared. It is sworn that the costs do not amount to 40*s.* *Pearse v. Pearse (a)* is an authority

(a) 9 B. & C. 484.

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against this rule. That was a reference of a suit at law and another in equity, and all other matters in difference between the parties. The chancery suit was respecting a sum of 2500*l.*, of which no part was in dispute but 500*l.*, claimed to be retained by the defendant as a gift, which the plaintiff contended was a loan, and which was the principal matter in dispute before the arbitrators. The award, after directing how the verdict in the action was to be entered, and how the 2000*l.* was to be paid, &c., ordered that the plaintiff in the chancery suit should cause the bill to be dismissed, and that all proceedings therein should cease, and each party pay his own costs: it was contended that the arbitrators did not put a final end to the chancery suit, by ordering the bill to be dismissed, and that they had not awarded respecting the 500*l.*: but it was held that, as it did not appear that there were any matters in difference but what were included in the action and the chancery suit, the arbitrators, by ordering the bill to be dismissed, and each party to pay his own costs, had adjudicated about the 500*l.*, and also sufficiently determined the suit. Here, the arbitrators, by directing that the action shall cease and be no further prosecuted, and that the defendant shall pay money to the plaintiff, has in effect determined the event of the action to be in favour of the defendant, as it does not appear that there were any other disputes but what arose out of the accounts, which were the subject of the action. The second and third grounds of complaint are completely negatived by the affidavits; upon the latter ground it is affirmed in the plaintiff's affidavit that one of the two arbitrators who made the award surrendered his judgment to the other; but, though it appears he did concede a little to the other, he swears he exercised his own judgment in the matter, and it is not denied that he heard all the evidence, and fully investigated the case. The fourth ground of complaint is too

general: the particular grounds of complaint ought to have been pointed out.

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Erle and *Greenwood*, in support of the rule.—*Leeming v. Fearnley* is precisely in point. The award is not final as to the costs: it is nothing more than a *stet processus*: the amount of the costs can make no difference. There may have been claims barred by the statute, and equitable claims; the sum awarded to the defendant may have been an equitable demand against the plaintiff. In the case of *Thornton v. Hornby* (a), a cause and all matters in difference were referred to the arbitration of the surveyor, the costs to abide the event. The defendant had paid 600*l.* into Court. The arbitrator awarded that the defendant had overpaid the plaintiff 34*l.* It was objected to the award that it was not final, and that the arbitrator should have disposed of the cause and the matters in difference separately. The Court thought there was so much doubt on the face of the award, that they refused to grant an attachment, and left the plaintiff to his remedy by action. In *Norris v. Daniel* (b), the cause and all matters in dispute between the parties were referred, the costs of the action and the award to abide the event of the award. There were eight counts in the declaration, and the arbitrators found that the plaintiff had a good cause of action on five of the counts, and that the defendant should pay to the plaintiff 5*l.* for his damages, and that no further proceedings should be had in the action. It was objected to the award, that, as nothing was said about three of the counts, it was impossible to say how the costs ought to go. On the other hand it was contended that ordering that no further proceedings should be had was sufficient; but the Court held that the arbi-

(a) 8 Bing. 13; 1 Moore & Scott, 383; 10 Scott, 48, S. C.

(b) 4 Moore & Scott, 383; 10 Bing. 507.

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trator, unless the costs are in his discretion, cannot omit deciding on the whole of the matters referred to him, so as to give them such a legal event as shall authorize the officer of the Court to tax costs.

ALDERSON, B.—That case was very much questioned in a late case in this Court (*a*).

PARKE, B.—In that case there were several issues, and the arbitrators probably proceeded on the ground that, if they said nothing as to these counts, the parties would be in the same situation as to costs, as if they had withdrawn a juror.

Erle and Greenwood.—Then as to the other objections, it is alleged that *Hayman* and *Flood* received in evidence memorandums made by *Steer* himself, as proof that he had delivered goods to the plaintiff, and that they required him to give strict proof in support of his claims: those facts are not satisfactorily contradicted. Then there are two other distinct grounds of complaint, which remain uncontradicted, *videlicet*, that the plaintiff was ill, and could not attend one of the meetings; and upon that occasion, there were two sums of 50*l.* and 10*l.* claimed by the plaintiff, the consideration of which it was agreed should be adjourned until he himself could attend; that is positively sworn to by *Ponsford*, one of the arbitrators, and the plaintiff's clerk; and that those sums never were adjudicated upon.

LORD ABINGER, C. B.—I think it sufficiently appears that the arbitrators have determined all matters in difference. *Ex parte Leeming* was a peculiar case; it was an

(*a*) *Quare Marquis of Anglessa v. Dibben*, 10 Bing. 568; 2 Cr. & M. 722.

action of replevin, and there were avowries: the arbitrators did not dispose of the action, and therefore the award was not final. Here, they have in fact determined the action in favour of the defendant; they were not obliged to use technical words.

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PARKE, B.—I am of opinion that this rule must be discharged; four objections have been taken to the award. Upon the first objection, perhaps, there may be some little doubt. It is said that the award is not final, because it has not decided the action for either party, and *Ex parte Leeming* has been much referred to; but in that case it was necessary that the award should express for whom the action was determined. It is said, that that case is not distinguishable from the present; but it is. In that case it must be supposed that there were special pleadings; the arbitrator may have ordered a *stet processus*, because he thought the avowry bad. Here the arbitrators had not only to determine the suit, but to pronounce in whose favour the balance of the accounts was, because the costs were to abide the event of the award; and therefore they have in fact determined against the plaintiff, because they direct the action to cease, and that, upon the balance of all the accounts, there is a sum due to the defendant. In *Ex parte Leeming*, the costs were to abide the event of the action, and therefore it was necessary to shew how the action was to be determined. Here, the costs are to abide the event of the award, and there are sufficient materials to shew that the event of the award is in favour of the defendant. The submission recites the action against *Steer* for 2000*l.*, and that he claimed a set-off against the plaintiff to a larger amount; and that disputes had arisen respecting the accounts, and that they had agreed to refer the action and all matters in difference. The award recites the submission, and then directs that the action shall

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cease, and that upon the balance of accounts the plaintiff is indebted to the defendant, the meaning of which evidently is, that the plaintiff has no cause of action. Undoubtedly, the legal and proper form would have been to have found that the plaintiff had no cause of action, which was all that the arbitrators could do; they could not order a verdict to be entered; that is clearly the effect of their determination: and with respect to the objection to the equitable claim, it is sufficient to say that there is no suggestion in the affidavits that any matter of an equitable nature was brought forward. But even supposing that this point is doubtful, though the Court would probably refuse an attachment, they will not set aside the award. In *Thornton v. Hornby*, all that the Court said was, that they would not grant an attachment; and in *Norris v. Daniel*, there were special counts not decided upon, and it may have been thought that the arbitrators intended to award in favour of the defendant.

As to the second objection, that meetings were held by two of the three arbitrators, that is distinctly disproved.

The third objection, that the award was made by one arbitrator only, also entirely fails, because it appears that each of them exercised his own independent judgment on the matter; and though *Hayman* was of opinion that 100*l.* was due to the plaintiff, more than the sum which *Flood* was willing to give, and that he gave way to *Flood* in that respect, that is a circumstance which must frequently happen; one or both must give way, otherwise they never could agree.

Lastly.—As to the partiality charged, it is distinctly sworn by *Hayman* and *Flood*, that the whole case was fully and fairly gone into, and the imputation is denied.

BOLLAND, B.—I am of the same opinion; the award might have been more formally drawn, and, from the affidavits, I should say that the conduct of the arbitra-

tors might have been of a different description; but there is not sufficient to set aside the award.

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ALDERSON, B.—This case must not be considered to be decided upon *Thornton v. Hornby*, because it appears to me that the report of that case is remarkably inaccurate.

Rule discharged with costs (a)

(a) See *Yates v. Knight*, 2 Bing. N. S. 277.

Sir F. L. H. GOODRICKE and Another, Assignees of the Sheriff of Staffordshire, v. TURLEY and Others.

A RULE *nisi* had been obtained by *Archbold*, calling upon the plaintiffs to shew cause why the defendants should not have *oyer* of the bond on which the plaintiffs declared, and why they should not be at liberty to enter a demand of *oyer* on the record, and why they should not have the same time for pleading after *oyer* granted as they had at the time it was demanded. This was an action on a bail-bond, and was commenced on the 3rd of *September*; the appearance was entered on the 17th, and the declaration was delivered on the 24th, indorsed to plead in eight days. On the 3rd of *November*, the plaintiffs consented to an order that the defendant should have six days for the time to plead, on the terms of taking short notice of trial; and on the 9th, another order was obtained for two days' further time to plead; on the 10th, *oyer* was demanded, and on the 11th, to prevent judgment being signed, the defendants pleaded a plea, denying the as-

A defendant is entitled to demand *oyer* after the original time for pleading has expired, and after an order has been obtained for further time to plead, unless such order on the face of it expressly excludes the defendant from the right to crave *oyer*.

In an action of debt upon a bail-bond, the defendant having demanded *oyer*, which the plaintiff refused to grant, pleaded that the bond had not been assigned to the plaintiffs, for

the purpose of preventing the plaintiffs from signing judgment for want of a plea.—*Held*, that the defendant, by pleading such plea, had not thereby waived his right to have an inspection of the bond.

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signment to the plaintiffs. On the same day this rule was granted. On the 12th, issue was joined, and notice of trial was given for the 20th. A rule *nisi* for staying proceedings on payment of costs, bail having justified, was obtained on the 13th.

J. Jervis now shewed cause (a).—The defendants have waived their right to demand *oyer*—*first*, by getting time to plead; and, *secondly*, by pleading a plea of no assignment, after demand of *oyer*. As to the first point, it is an established rule that *oyer* ought to be demanded before the time for pleading has expired. In *Hartley v. Varley* (b) it was held, that a demand of *oyer* after the rule for pleading had expired, was too late. So, in *Theadom v. Jackson* (c), the Court seemed to have been of opinion, that *oyer* must be demanded before the rule for pleading is out. In *Farrand v. Brignoll* (d), a summons was taken out for *oyer*, and another for time to plead; but on an affidavit that *oyer* had not been demanded until after the rule for pleading was out, the Court refused to make any rule. So, in the *Duke of Leeds v. Vevours* (e), judgment being signed, on the ground that a demand of *oyer* after the rule to plead had expired was bad, the Court set aside the judgment, because it appeared that the defendant's eight days' time to plead had not expired, and they said that *oyer* might be demanded at any time within the eight days. So, in *Barber v. Satchwell* (f), where a judgment was signed, *oyer* not having been demanded till after the time for pleading had expired, the Court held, that the judgment was regularly signed; and though it was stated by *Best*, Serjt., in argument, in *Sparks v. Simpson* (g), that *oyer* is demandable, though further time for pleading has

(a) November 18th.

(b) *Barnes*, 329.(c) *Ib.* 238.(d) *Ib.* 241.(e) *Barnes*, 268.(f) *Ib.* 326.(g) 2 *Bos. & Pull.* 379.

been obtained, yet the authorities are the other way. In *Gerard, administratrix, v. Early* (a), a special application was made to the Court to enable the defendant to plead a plea, putting in issue the grant of letters of administration to the plaintiff; but it being objected, that that plea could not be pleaded without *oyer*, and that the rule to plead was out, the Court refused the application. The defendants have bound themselves by the Judge's order to plead in a certain time, but if *oyer* can afterwards be demanded, the defendants may extend the time allowed by the Judge, because they have as much time after the demand of *oyer* for pleading, as they had before; and therefore, by coming just at the last moment, as they have done here, they may throw the plaintiffs over the sittings. When time was demanded, they should have given notice that they intended to crave *oyer*, and the Judge would then have been enabled to say what time ought to have been allowed for pleading; they ought to have made it a condition at the time the order was obtained for further time (b). *Secondly*, supposing *oyer* ought to have been granted, and has been improperly refused, the defendants should have stood upon the objection, instead of which they have pleaded a plea, and thereby waived their right to demand *oyer*, for the only use of *oyer* is to enable the defendant to plead; and the plea pleaded, that the bond was not assigned to the plaintiffs, shews that *oyer* of the bond was unnecessary.

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Archbold, in support of the rule.—The defendants had

(a) 2 Wils. 413.

(b) The same principle was adopted in *Adams v. Drummond*, ante, Vol. 1, p. 99, where an order for time to plead, and another for particulars of demand, were obtained at the same time; it was held,

that the time for pleading ran on, notwithstanding particulars were not given, and that it ought to have been expressed in the order for time that the defendant was to have the time after the delivery of particulars.

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a right to demand *oyer*, and also to have the claim of *oyer* entered upon record, because the refusal to grant *oyer* when it ought to be granted, is a ground of error.

PARKE, B.—You have only a right to have the demand entered on the record where the demand has been regularly made.

Archbold.—It is admitted that we had a right to demand *oyer*, unless we have abandoned our right by obtaining time for pleading, or by pleading a plea of no assignment. As to the first point, most of the cases cited are inapplicable, because they only shew that *oyer* cannot be demanded after the time for pleading has expired, and after the rule to plead is out; but the rule is not true even to that extent, because, in *Sparks v. Simpson* (a), it was held, that *oyer* may be prayed at any time before the expiration of twenty-four hours after the demand of a plea, though the rule to plead be out, and though the time for pleading be expired; and it was admitted in that case, in argument, that if the demand of *oyer* had been within the time allowed for pleading, though that time had been enlarged by a Judge's order, that it would have been perfectly regular. So, in *Barber v. Satchwell*, time for pleading had been obtained, and it was not contended that if the demand had been made within the enlarged term it would have been irregular; and it is there said that the Chief Justice expressed an opinion that it was reasonable that *oyer* should be demandable at any time before judgment. In the present case, it does not even appear that any rule to plead has been obtained, or that any demand of plea was made, and it does appear that the demand of *oyer* was made within the time allowed by the Judge's order.

(a) 2 Bos. & Pull. 379.

PARKE, B.—Does not the time given by a Judge exclude by implication the right to have any further time, and therefore the right to demand *oyer*? If it does not, the defendant has it in his power to extend the time given him by the Judge.

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BOLLAND, B.—In *Sparks v. Simpson* no order for further time had been obtained.

Archbold.—The order for further time makes no difference. The defendant, in the first instance, is only allowed by the practice certain time, and yet it is admitted that he has the same time to plead after the demand of *oyer* has been complied with, as he had at the time the demand was made. *Theadom v. Jackson* (a) and *Simpson v. Dafido* (b) are express authorities to the latter point. The Judge's order allows further time, which is granted either upon terms or not; if no condition is imposed, the extended time is taken exactly on the same terms as the original time. The plaintiffs, knowing that we were entitled to *oyer*, ought to have made it a condition when time was granted, that we should not have *oyer*; that was not done: the demand of *oyer*, therefore, ought to have been complied with, and when the plaintiffs positively refused to grant *oyer*, which is a matter of right, we cannot be said to have waived our right to insist upon *oyer* merely because we pleaded a plea to prevent the plaintiffs from getting judgment.

PARKE, B., after consulting with the other Barons, said, that the Court were of opinion that the defendant had not waived his right to demand *oyer*, and have it entered on record, because he had pleaded a plea to the assignment only, and not to the bond. The question then re-

(a) Barnes, 238.

(b) lb. 254.

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mains, whether he made the demand in due time, for he has no right to enter it upon record, unless *oyer* was claimed in due time. The defendant has a right to make his demand of *oyer* at any time before the usual time for pleading has expired; but it seems to be a doubtful point, whether he is entitled to it after obtaining an order for time. There are authorities both ways. In *Archbold's Practice* it is laid down, that it must be made before the time for pleading has expired, or before the expiration of time limited by a Judge's order; but the authorities cited do not come up to that extent. The officers of this Court, however, say, that, unless an exception is made in the Judge's order, the defendant has the same rights he had before. In future it must be understood, that if it is intended to shut out the defendant from his right to demand *oyer*, he must be expressly excluded from so doing by the order itself. There is an inconvenience in making a party always crave *oyer* before he knows whether it will be necessary or not. Before, however, we give our final opinion on the point, we will ascertain what the practice is in the other Courts.

ALDERSON, B.—The object of craving *oyer* is to enable the defendant to plead; and is it not equally necessary for that purpose, that the defendant should have an inspection of the instrument declared on, whether the time has been enlarged or not?

Subsequently in the day, PARKE, B., said—The Masters of the Court of *King's Bench* agree in opinion that *oyer* has been demanded in proper time, and that the defendant was not precluded by the order for time, because it was not made one of the terms of the order that he should be so; and the officers of the *Common Pleas* are of the same opinion. The rule will therefore be absolute. There will be no occasion to enter the demand on record.

Oyer must be granted, and the defendant will have the same time for pleading *de novo* after it has been granted, as he had before. The defendant must agree to plead issuably, rejoin gratis, and take short notice of trial; and, as the point was doubtful, neither party will have costs subsequently to the refusal to grant *oyer*.

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Rule absolute on those terms.

DOE v. HUDDART.

THIS was an action of trespass for mesne profits. The defendant pleaded, as to the trespass, prior and up to the 1st of *March*, 1835—*first*, not guilty; *secondly*, that the premises were not the premises of the plaintiff; and, *thirdly*, leave and licence of the plaintiff; and as to the other trespasses alleged in the declaration, the defendant pleaded payment into Court of 55*l*. At the trial before *Bolland, B.*, at the *Carnarvonshire* Assizes, the judgment and writ of possession in the original action of ejectment were given in evidence, and also the bill of costs, amounting to 99*l*., which was proved to be reasonable as between attorney and client, with a deduction of about 4*l*. It appeared that the judgment in ejectment was by default, and the defendant therefore purposed to prove under the second plea a title in himself up to the 1st of *March*, 1834. This was opposed by the plaintiff, who contended that the judgment in ejectment was conclusive, there being a demise laid in the declaration on the 18th of *June*, 1831; and the evidence was rejected by the learned Baron. The defendant also contended that the plaintiff was only entitled to costs as between party and party, and called witnesses, who proved that about 22*l*. only would be allowed by the Master. The learned Judge

Where judgment in ejectment has been allowed to go by default, the plaintiff, in an action for mesne profits, is entitled to recover his reasonable costs, as between attorney and client, and not merely as between party and party.

To a declaration in trespass by *John Doe* as plaintiff, the defendant pleaded, that the premises were not the premises of the plaintiff:—*Held*, that under this plea the defendant was at liberty to prove title in himself, the judgment in ejectment not being *conclusive* against the defendant, unless shewn upon record.

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told the jury that the plaintiff was entitled to recover the costs reasonably incurred, with the exception of certain charges, which he thought could not be allowed, viz. two charges for special retainers to counsel, &c. The jury, allowing for the sum paid into Court, found for the plaintiff for the mesne profits from *June* 18, 1831, to *May* 17, 1834, (on which day it appeared that the plaintiff had had possession), 360*l.*, and for the costs 45*l.*

R. V. Richards moved for a new trial, for misdirection of the learned Judge; *first*, because the judgment in ejectment was not conclusive unless pleaded, for which he cited *Vooght v. Winch* (a), and *Outram v. Morewood* (b). *Secondly*, that the plaintiff was entitled only to costs as between party and party. *Doe v. Hare* (c).

J. Jervis and *Welsby* shewed cause, and, with respect to the costs, relied on *Doe v. Davis* (d), where the distinction was taken by Lord *Kenyon*, between a judgment by default and after verdict—that in the former the whole costs might be recovered, but not in the latter, because they had been taxed, and which distinction was recognized in *Brooke v. Bridges* (e). [The question of costs was afterwards given up by *Richards*].

The arguments upon the other point will be found noticed in the judgment of the Court. *Aslin v. Parkin* (f) was cited on shewing cause, and *Lloyd v. Peell* (g) in support of the rule.

The Court took time to consider of their judgment, which was delivered in *Trinity* Term, by—

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| (a) 2 B. & Ald. 662. | post, Hil. T. 1836, where the |
| (b) 3 East, 346. | same principle was acted upon. |
| (c) Ante, Vol. 2, p. 245. | (e) 7 B. Moore, 471. |
| (d) 1 Esp. 358. See the late | (f) 2 Burr. 665. |
| case of <i>Grace v. Morgan</i> , C. P., | (g) 3 B. & Ald. 407. |

BOLLAND, B.—There was a case of *Doe v. Huddart*, in which the Court took time to consider. It was an action of trespass for mesne profits, tried before me at the last assizes for the county of *Carnarvon*. The declaration was in the ordinary form. The defendant pleaded as to all the trespasses alleged to have been committed before 1834, that the plaintiff had no title to the possession of the land at that time; and as to all the subsequent trespasses, he paid 55*l.* into Court, and denied damages *ultra* that sum. At the trial the judgment in ejectment, which had been suffered by default, was produced in evidence. The record contained (in effect) two demises, one in 1834, and one at an earlier period. The mesne profits accruing subsequent to the demise in 1834, were fully covered by the money paid into Court. At the trial it was proposed to shew by evidence, that the title of the lessor of the plaintiff did not accrue before the time of the demise, in 1834. I refused to admit this evidence, on the ground that the judgment in ejectment was conclusive against the defendant. A rule *nisi* was obtained for a new trial, and upon cause being shewn, the Court took time to consider of its judgment. On full consideration, we are now of opinion that the evidence was receivable, and that the rule ought to be made absolute. The general rule of law since the case of *Vooght v. Winch* must, we think, be taken to be clearly established; and that is, that a judgment between the same parties is not conclusive, unless pleaded as an estoppel. There are two modes, as Mr. Justice *Holroyd* there observes, which a party may adopt: he may say, the other party is not at liberty to call upon me to answer for what has been previously decided; or he may say, that his opponent has no such ground of action as he has alleged. In the latter case, he refers the question to the jury, who are to determine, not whether it has been previously so decided, but whether the right be as alleged in the pleadings of the parties. And in

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Goddard's case (a) it is laid down, that although in pleading the obligee cannot allege delivery before the date, because he is estopped from taking an averment against any thing expressed in the deed, yet the *jurors*, who are sworn to say the truth, shall not be estopped. Now, if this be the general proposition of law, it is difficult to understand upon what principle there should be any difference between an action of ejectment and any other action. It is said that the action of ejectment is a creature of the Court, and that therefore there is a sufficient ground of distinction; but it would surely be more reasonable to conclude that the Courts, in creating these actions, would, as far as possible, follow the course in other actions, and not unnecessarily create an anomaly to the general rules of evidence upon trials. If the jury are sworn to try the issue in this case, why is the effect of their oaths to be different in the trial of an action of this description, from its effect in any other? We can see no reason for such a conclusion; and, consequently, we think that the cases of *Vooght v. Winch*, and *Outram v. Morewood*, are not distinguishable in principle from the present case. Then, if so, although undoubtedly there are to be found *dicta* of learned Judges, and particularly of Lord *Mansfield*, in *Aslin v. Parkin*, which have been transferred to the treatises upon evidence, as establishing that a judgment in ejectment is conclusive as to the right of possession at the time laid in the declaration, and that it is laid down by Mr. *Phillipps*, in his *Law of Evidence* (b), and upon which I acted at the trial, yet the Court think that these authorities are not entitled to so much weight, because they may be explained on the supposition that the point was not specifically presented to the Court; and the circumstances of those cases were such as would make it immaterial for those learned Judges to distinguish between what is very

(a) 2 Rep. 4 b.

(b) 7th Edit. 324.

cogent, and what is *conclusive* evidence in the cause; and more especially between cases where it may be conclusive, if pleaded, but not so unless it is put on the record. A similar *dictum* of Lord *Mansfield*, in *Bird v. Randall* (a), is adverted to and overruled by Lord *Tenterden*, in his judgment in *Vooght v. Winch*; although it is due to Lord *Mansfield* to say, that the report in *Burrow* does not seem to justify the argument founded on it by counsel in later cases. Upon the whole, therefore, we think that, in this case, the record of the judgment in ejectment, although of some weight, was not conclusive evidence in the cause; and that, consequently, the defendant should not have been precluded, in this state of the pleadings, from giving the evidence he proposed to give. For these reasons, we are of opinion, that the rule for a new trial must be made absolute.

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Rule absolute.

(a) 3 Burr. 1353.

— *Gill v. Hight. 22 L.C.R. 250.*

WILSON v. NORTHORP.

L.C. 4 L.C.R. 290.

WIGHTMAN had obtained a rule calling upon the plaintiff's attorney to shew cause why he should not pay to the defendant, or his attorney, three several sums of 1*l.* 18*s.* 2*d.*, 3*l.* 3*s.* 2*d.*, and 3*l.* 16*s.* 6*d.*, and also the costs of the application.

W. H. Watson shewed cause.—From the affidavits, it appeared, that the defendant having given a cognovit to

After an order of a Judge at chambers has been made a rule of Court, it is too late to object, in answer to a rule calling upon the party to pay money in pursuance of such order, that the Judge had no power to make it.

Quære, whether a Judge at chambers has power, during term, to order the attorney to pay the costs of irregular proceedings.

An order of a Judge at chambers was obtained in term, for setting aside an irregular judgment with costs: the costs were taxed upon the order, which was then made a rule of Court, and then a personal application was made of the amount:—*Held*, that this was the regular mode of proceeding.

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pay the debt on a particular day, with a proviso, that if not then paid, the costs were to be taxed, and judgment signed, and the defendant not having paid the debt at the appointed time, the plaintiff's attorney signed judgment, and taxed the costs. The defendant then tendered the debt and costs, but protested against being charged with the costs of the judgment, inasmuch as the cognovit only authorized the plaintiff to sign judgment after the costs had been taxed. The plaintiff's attorney not agreeing to give up the costs of the judgment, an application was made to *Gurney, B.*, at chambers, to set it aside, and the learned Judge made an order, not only that the judgment should be set aside, with costs, but that the plaintiff's attorney should pay the costs, as well of the application as of the judgment, out of his own pocket. An appointment was accordingly made for the taxation of costs on the 30th of *April*, the order having been made on the 27th; the plaintiff's attorney did not attend, and the costs were taxed at the sum of *3l. 3s. 2d.* On the 5th of *May*, a summons was taken out before a Judge at chambers, to rescind that part of the order, but the learned Judge dismissed the summons. Frequent demands having been made for the payment of that sum and the costs of the judgment, amounting together to the sum of *5l. 1s. 4d.*, the defendant's attorney, on the 28th of *May*, made the order a rule of Court, and on the 30th the costs were taxed upon that rule at the sum of *3l. 16s. 6d.* On the 2nd of *June*, a personal demand was made of the three sums of money: on the same day the plaintiff's attorney offered to pay the *5l. 1s. 4d.*, and an application was also made to the Court on behalf of the plaintiff's attorney to set aside the learned Judge's order, which was refused (a). It was now contended that the taxation of costs was irregular, as the affidavit in support of the rule merely stated that the

(a) See the case, ante, p. 212.

plaintiff's attorney was served with a notice to tax, but did not state that any appointment had been made with the Master, or that any bill of costs had been delivered.

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PARKE, B.—The affidavits in answer do not aver the contrary, and therefore it must be taken that proper notice was given.

W. H. Watson.—The order was improperly made in the first instance. Whilst the Court is sitting, a Judge at chambers has no power to inflict penalties upon attorneys. The Judge, therefore, had no jurisdiction; and though it was reported by the officer here, that the costs might be taxed on the cognovit and not on the judgment, the practice of the other Courts is certainly different: at all events, there was no reason why the attorney should be ordered to pay the costs. Besides, the costs ought not to have been taxed upon the order until it was made a rule of Court; and it is sworn that on the same day that the demand was made, the plaintiff's attorney tendered 5*l.* 1*s.* 4*d.*: he ought, therefore, not to be charged with the expense of making the order a rule of Court (a).

LORD ABINGER, C. B.—In this stage of the proceedings the jurisdiction of the Judge cannot be disputed: the order having been made a rule of Court, it has now become the act of the Court.

PARKE, B.—This is a rule calling upon the attorney to

(a) It was sworn in support of the rule, that the Master, on application to him, certified that the regular course was to tax the costs on the order, and that Mr. Baron Parke had decided in a similar case, that it was the proper course, in order to avoid, if possible, the expense of making the order a rule of Court.

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pay certain sums of money in pursuance of an order which has been made a rule of Court: it is therefore in the nature of an attachment. There had been a demand and refusal of the costs ordered to be paid by the Judge, and therefore the party was in contempt: the other side, therefore, ought to have the costs of making the order a rule of Court, which the Master says is the constant practice.

ALDERSON, B.—The Court give no opinion as to the power of a Judge at chambers to make such an order, as under the particular circumstances of this case it is unnecessary for them to do so.

GURNEY, B.—It is too late now to take the objection.

Rule absolute with costs.

LESTER v. LAZARUS.

Where a motion for a new trial is by accident delayed beyond the four days, notice ought to be given to the other side, otherwise the expense of intermediate proceedings will fall on the party delaying to move.

MAHON moved to discharge a rule *nisi* obtained by *Mansel* for a nonsuit, under these circumstances. The action was tried before the under-sheriff of *Middlesex*, in *October*, and a verdict found for the plaintiff. The writ of trial was returnable on the 30th, and on that day a return was made with a verdict for the plaintiff indorsed, but there was no indorsement that execution should be stayed till application should be made to the Court. On the 4th of *November* notice of taxation for the 5th was given. On the evening of the 4th, notice was given of an intended application to the Court to set aside the verdict, by permission of the under-sheriff. On the 5th both parties attended, and the costs were taxed. On *Saturday* the 7th, judgment was signed, and on *Monday* the 9th,

execution issued, upon which the defendant's goods were seized. The rule *nisi* for a new trial was served on the 10th, not having been granted till that day. Notice was at the same time given, that an action of trespass would be brought for the seizure of the goods.

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The Court granted a rule for discharging the former rule, unless the whole debt and costs were brought into Court, and upon payment of the costs of the judgment and execution, and of the rule then pending.

Mansel on a subsequent day shewed cause.—It appeared, that there not being sufficient time to hear this motion on the fourth day of term, which was *Thursday* the 5th, a list was made of this and other cases; and that on a subsequent day, when it was called on, counsel being unavoidably absent, it was struck out; but the Court, as a favour, allowed the motion to be made on the 10th. No notice, however, had been given of these circumstances to the other side, and the plaintiff's attorney was misled by seeing the name struck out of the reserved list.

The Court said that notice should have been given by the defendant's attorney of the circumstances which prevented the motion being made earlier; and they ordered the rule to be absolute, unless the defendant paid the costs occasioned by the execution and this application; and as an execution was in the house, they further ordered it to remain, until the rule for a nonsuit was disposed of.

Rule accordingly.

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JONES v. PALMER the Younger.

Certain books of the plaintiff had come into the defendant's possession as his agent. It became necessary for the plaintiff to inspect them. The Court ordered the defendant to allow an inspection, but would not order him to deliver them up.

CROWDER showed cause against a rule which had been obtained by *Butt*, calling upon the defendant to show cause why he should not deliver up to the plaintiff certain books of the plaintiff in the hands of the defendant, and why the plaintiff should not be allowed to take copies of them. The plaintiff swore that the books had been put by him into the defendant's hands, as an agent, for the purpose of carrying on his business, and that he could not proceed in this action (*a*) unless two of them were delivered up. It was also sworn by the plaintiff that a suit was now pending against him by the excise for certain arrears of duty, arising out of that business, and that those books of accounts contained entries between the plaintiff and his customers, and between the plaintiff and the defendant, and that they were necessary for the purposes of both suits. The defendant, in answer, denied that any books of the plaintiff's were in his possession, care, or custody; that the books had been produced to the plaintiff some time since, and he had a full examination of them. It was objected that the defendant could not be compelled in this mode to deliver them up.

Lord ABINGER, C. B.—As the defendant does not deny having been agent for the plaintiff, and that he obtained the books as agent for the plaintiff, I think the defendant is bound to allow an inspection, as it is sworn that they are material to enable the plaintiff to proceed with the suit; but I do not think we can order them to be delivered up.

(*a*) It did not appear by affidavit what the action was: but it was stated to be assumpsit with the money counts.

PARKE, B.—I think this case comes within the rule, that where a party holds an agreement as trustee for another, he is bound to allow an inspection. The defendant does not swear that the books are not in his power. The defendant must allow an inspection, and copies of those accounts between the plaintiff and defendant which relate to this action.

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Rule absolute for an inspection and copies.

—◆—
REX v. ROBINSON.

UPON a judgment obtained against the defendant for penalties under the excise laws, an extent issued to the sheriff of *Staffordshire*, indorsed to levy 1000*l.*, by virtue of which the sheriff seized certain goods of the defendant, which were appraised at 824*l.*; but, before they were sold, the defendant compromised with the excise, by paying 500*l.*, which the excise agreed to accept in full. The sheriff claimed to retain out of this sum his poundage on 824*l.* On behalf of the Crown it was contended, that he was only entitled to his poundage on the 500*l.* A rule *nisi* having been obtained, calling upon the sheriff to shew cause why he should not pay over to the collector of excise, for the use of the Crown, the sum of 472*l.* 10*s.*, being the balance of the sum of 500*l.* levied on the defendant's goods under the extent, after deducting 27*l.* 10*s.* for the sheriff's poundage thereon,

The sheriff is entitled to poundage on the sum received under the execution only, and not on the amount claimed or seized.

Jervis, K. C., shewed cause.—This question turns on the construction of the 3 *Geo.* 1, c. 15, s. 3 (a). The

(a) This section enacts that except post fines due to the king's
“all sheriffs who shall *levy* any majesty, his heirs or successors,
debts, duties, or sums of money, by process to them directed upon

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meaning of the word "levy" is to "seize:" it does not necessarily mean that the goods are to be sold; and parties, by compromising after the levy, but before the goods are sold, cannot deprive the sheriff of the fee to which he is by law entitled; that was expressly determined in *Alchin v. Wells (a)*.

PARKE, B.—That case does not shew what were the terms of the compromise; and the question did not turn on what amount of poundage the sheriff was entitled to, but whether he was entitled to any poundage at all. Is there any case where the sheriff has received poundage on more than has actually been received?

Jervis.—In *Bullen v. Ansley (b)*, it was held that the sheriff is entitled to his poundage on an execution levied, though the execution is afterwards set aside for irregularity. So in *Rawstorne v. Wilkinson (c)*, it was held that where the sheriff has regularly levied, he is entitled

the summons of the pipe, or green wax, or by levary facias out of the Court of Exchequer, shall from time to time, for their care, pains, and charges, and for their encouragement therein, have an allowance upon their accounts of twelve pence out of every twenty shillings, for any sum not exceeding 100*l.*, so by them levied or collected, and the sum of sixpence only for every twenty shillings over and above the first 100*l.*; and for all debts, &c. except post fines, due to his majesty, his heirs and successors, by process on fieri facias and extent, issuing out of any of the offices of the Court of Exchequer, the sum of 1*s.* 6*d.* out of every twenty shillings, for any

sum not exceeding 100*l.*, so by them levied or collected, and the sum of twelve pence only for every twenty shillings over and above the first 100*l.*: provided always, such sheriff shall duly answer the same upon his account, by the general sealing day of such term in which he ought to be dismissed the Court, or in such time to which he shall have a day granted to finish his said accounts, by warrant signed by the Lord Chief Baron, or one of the barons of the coif of the said Court for the time being, and not otherwise."

(a) 5 T. R. 470.

(b) 6 Esp. 111.

(c) 4 M. & Selw. 256.

to poundage, though the money raised is ordered to be restored to the defendant. *Rex v. Burrell* (a) is to the same effect: there, upon an outlawry against a defendant, and a levari to the sheriff, he levied the rents and profits of the defendant's lands to the amount of 60*l*. The defendant having afterwards obtained leave to plead, and to have a return of the money upon giving security, the sheriff claimed to detain for his poundage, and offered to pay over the money with that deduction; and the Court refused to grant an attachment against him for not paying over the money, expressing an opinion that the sheriff was entitled to the poundage. *Sir Daniel Norton's case* (b) shews that the meaning of the word "levied" may be satisfied, though no property is either seized or sold. In that case, process having been directed to the sheriff to levy 27*l*., the writ was put into the hands of the under-sheriff; the latter owed a debt of 30*l*. to the defendant by bond, and upon his telling the defendant that he had a writ to levy 27*l*. against him, the defendant claimed his 30*l*. from the under-sheriff, and upon the defendant's agreeing on receiving 3*l*. to give up the bond, the under-sheriff agreed to discharge the defendant from the writ for 27*l*.; and it was held that the sheriff was answerable to the King for the 27*l*. as for money levied by him. This case was confirmed in the *King v. Jotherell* (c). In the *King v. Fry* (d), it was contended that the sheriff was not entitled to claim poundage *de jure*, unless the levy was completed; but it was held that he was, the debt having been paid in consequence of the seizure. The *King v. Barber* (e) was also a strong case in favour of the sheriff: there, the extent issued for 124*l*. 19*s*., and the sheriff seized goods

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(a) Bunb. 305.

(b) Lane, 74.

(c) 3 Anstruther, 718, note (a).

The same case is incorrectly re-

ported in 2 Anstr. 358.

(d) 3 Anstruther, 717.

(e) Parker, 177.

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to the value of 260*l.* only, and before a *venditioni exponas* issued, the defendant paid the whole debt to the sheriff, and it was held, that the latter was entitled to his poundage on the whole amount. These cases shew, that the sheriff in the present case having seized to the full amount of the debt, thereby acquired a right to poundage to the extent of the value of the goods seized: he, therefore, cannot be deprived of that right by the Crown's agreeing to take a less sum.

Tancred, in support of the rule, was stopped by the Court.

PARKE, B.—The sheriff is clearly entitled to poundage on the 500*l.*, but there appears to be no authority to shew that the sheriff is entitled to claim poundage on a larger sum than the Crown actually receives under the levy: and in the absence of any such authority, I think he is here only entitled to poundage on the sum of 500*l.*

ALDERSON, B.—I am of the same opinion. Upon principle I think the sheriff is only entitled to poundage on the sum actually received, because that only can be considered as levied.

BOLLAND and GURNEY, B*s.*, concurred.

Rule absolute.

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CONNOR v. HOLMES.

ASSUMPSIT.—*First* count on a bill of exchange, drawn by the defendant upon, and accepted by *Thomas Pratt Barlow*, for 100*l.*, at two months after date, and indorsed by defendant to plaintiff. *Second* count on another bill between the same parties for 200*l.* Common counts and conclusion.

Plea to the 1st and 2nd counts, that before and at the time of the making by defendant of the said several bills of exchange in those counts, and each of them respectively, mentioned, to wit, on said 13th day of *April*, 1835, the said *Thomas Pratt Barlow* was in want of a loan of money, to wit, of the sum of 500*l.*, and then applied to said plaintiff to lend and advance him the same; but which the said plaintiff was unwilling to do unless the said *Thomas Pratt Barlow* would accept the said loan, partly in money and partly in wine, (that is to say), two-thirds money and one-third wine, and would pay for the same, by the said plaintiff's having the security of a bill or bills, drawn by the said defendant upon and accepted by the said *T. P. B.* That the said *T. P. B.* then consented and agreed to the said terms, and gave notice thereof to the said defendant, and that thereupon the said two several bills of exchange in the 1st and 2nd counts respectively mentioned were accordingly drawn by him, the said defendant, and accepted by the said *T. P. B.*; and the defendant further saith, that he never received any consideration or value, nor did any consideration or value whatever ever move or pass from the said parties, or either of them, to the defendant, for the drawing by him of the said several bills of exchange, or either of them, except as aforesaid. And the defendant further saith, that the said wine hath not, nor hath any part of it, hitherto been delivered, and that the said contract for

To an action against the defendant as drawer and indorser of two bills of exchange, the defendant pleaded, that the plaintiff was applied to for a loan of money to *T. P. B.*, but agreed to give two-thirds of the amount in money and one-third in wine, upon having the two bills given to him as security for the wine; the plea then averred, that the contract for the sale and delivering of the wine was a gross fraud, and that the defendant had not had any value, &c. The plaintiff replied, that there was a good consideration for the drawing, and concluded to the country. On special demurrer to the replication for concluding to the country:—*Held*, that the plea was bad, as being only an answer to a part, and that the allegation of fraud was too general.

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the sale and delivery thereof *was a gross fraud* both upon the said *T. P. B.* and the said defendant; and this he is ready to verify. As to the residue of the causes of action, *non assumpsit*.

Replication to the plea to the 1st and 2nd counts, that there was, at the respective times of drawing the said bills of exchange in those counts mentioned, a good and sufficient consideration and value for the drawing and indorsing, by the defendant, of the said several bills of exchange, and each of them. And this, he, the plaintiff, prays may be inquired of by the country, &c.

Demurrer.—Assigning for causes that the replication is no answer to the plea, and neither traverses nor confesses and avoids the same; and also that nothing is put in issue by the said replication. And for that it concludes to the country, although no traverse is therein contained, &c.

Miller appeared to support the demurrer.—The replication is bad, because it alleges new facts, and concludes to the country.

PARKE, B.—Supposing the replication to be bad on that ground, the plea is also bad: it is pleaded to the action brought on two bills of exchange, which the plea alleges were given in pursuance of an agreement by the plaintiff to advance money; we must assume that the money was paid in the absence of any averment to the contrary.

Miller.—It is alleged in the plea, that it was part of the agreement that wine should be delivered in part payment: the transaction respecting the wine is alleged to be a gross fraud; that vitiates the whole.

PARKE, B.—What is the meaning of “gross fraud?” It is not shewn how, or in what shape or way it was a

gross fraud; nor is there any allegation of fraud as to the entire contract. That part of the plea is absolute nonsense.

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Miller.—Fraud may be alleged generally, without stating how. In *Chitty on Pleading* (a), it is laid down, that the plea of fraud may be either specific or general. Besides, they have pleaded over, and are concluded from objecting to the generality of the allegation.

PARKE, B.—The plea is only an answer to part, and therefore bad. The judgment must be for the plaintiff.

BOLLAND, ALDERSON, and GURNEY, Bs., concurred.

Judgment for the plaintiff.

(a) Vol. 1, 5th Ed. 570.

PICKFORD v. EWINGTON.

HUMFREY obtained a rule *nisi*, for setting aside an order of Lord *Denman* in this action, which required, that on the payment of 16s. to the plaintiff, without costs, all proceedings should be stayed, and that *Gardner*, (the plaintiff's attorney,) should pay the costs.

After a Judge has made an order at chambers, an application to the Court to set aside that order may be made upon the same affidavits as were used before the Judge at chambers.

Mansel shewed cause.—He objected, first, to the affidavits on which the motion was made. They were the affidavits which were used on shewing cause at chambers, against the order made by Lord *Denman*. They had not been re-sworn, nor was there any fresh affidavit now made, referring to or verifying them. He contended that these

An assignee of a debt has a right to use the assignor's name in suing for it, and it is a sufficient authority for the attorney,

if he is instructed by the former to commence proceedings.

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affidavits having been used, could not be re-used now in support of a fresh motion. He also contended that there ought to have been an affidavit to show the Court on what grounds the Judge decided.

PARKE, B.—If these affidavits are false, the deponents can be indicted for perjury; and there is no reason why the parties should be put to the expense of fresh affidavits.

Mansel.—The learned Judge made the order on the ground that no sufficient authority was shewn by *Gardner* for bringing the action in the name of the plaintiff. All that appeared was, that *Pickford* had assigned the debt to a person of the name of *Bamford*, by whom *Gardner* was authorized to sue. It was now contended, that there could be no valid assignment without the consent of the defendant, and that the defendant could not be safe without the receipt of *Pickford*. It was also objected that the power of attorney, or written instrument assigning the debt, ought to have been produced; and that even supposing there was an assignment of the debt, the fact ought to have been communicated to the defendant. The debt, it was said, had been paid to *Pickford* two days after the order was made, and that *Gardner* had absconded, and made no affidavit.

Humfrey, in support of the rule, was not called upon.

PARKE, B.—The order must be set aside, so far as it orders *Gardner* to pay the costs, because it clearly appears by the affidavits, that he had the authority of the assignee, and that the latter was authorized by the plaintiff. The rule must be modified by ordering proceedings to be stayed, on payment of costs, up to the time of the application. Frequent applications had been made

to the defendant for the money, and he had never demanded a receipt from the plaintiff.

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The rest of the Court concurred.

Rule absolute.

REX v. The SHERIFF OF LINCOLNSHIRE, in a Cause
of BURTON v. GEE.

WIGHTMAN showed cause against a rule which had been obtained for setting aside an attachment against the sheriff, and for staying proceedings in the mean time. The rule was supported by an affidavit of the defendant that he had been arrested on the 31st of *August*, and had then given bail to the sheriff and was discharged, and that on the 5th of *September* special bail were put in, but were opposed and rejected on account of a defect in the affidavit of justification. The defendant further swore that he had a good defence to the action on the merits. It was objected that there was no affidavit by the bail or officer, denying collusion, &c.

A motion setting aside a regular attachment against the sheriff for not bringing in the body on payment of costs, must be supported by an affidavit that bail above have justified, or that the defendant has been rendered.

It is not necessary for the purpose of such a motion, that the bail should deny collusion, &c. if the defendant swears that he has a good defence to the action on the merits.

PARKE, B.—Here there is an affidavit of merits by the defendants, and that is considered equivalent (a).

Wightman.—There is no affidavit that the defendant has rendered, or put in and perfected special bail.

J. H. Terrell, in support of the rule, cited *Tidd's Practice* (b), where it is said that the practice when the sheriff has been fixed, is to move for a rule to show cause why on putting in bail, the proceedings against him

(a) See *Bell v. Taylor*, 1 Chit. Rep. 572; *Tidd*, 316, &c.

(b) 9th ed. p. 316, citing 1 Bos. & Pull. 334, per *Buller, J.*

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should not be set aside, and to have the bail ready to justify when the rule is disposed of.

Wightman urged that applications had been frequently refused on this objection.

PARKE, B. (a).—I have always considered it necessary that bail should have justified, or that there should have been a render: but perhaps the inconvenience attending the sheriff's being taken into custody on the attachment, may have been the cause of the rule. The rule, however, ought not to be drawn up till the render has been made. It must not be understood that the Court has decided that this is the course to be pursued in future: there is an inconvenience attending it: and my impression has always been that the render should have been complete when the motion is made.

The Court at first ordered that the rule should be absolute on payment of costs, the defendant rendering in four days; otherwise, that it should be discharged with costs: but ultimately the rule was ordered to be discharged, without costs.

Rule discharged, without costs.

(a) Present, *Bolland, Parke, Alderson*, and *Gurney*, Barons.

THORP v. COLE and Others.

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ASSUMPSIT by *William Thorp*, against *Simon Cole*, *Thomas Mehew*, *Thomas Haslop*, and *Jonathan Miles Weston Flood*. The declaration, after setting out the agreement to refer, (the substance of which will be found recited in the award set forth on *oyer* in the plea), averred mutual promises to perform the agreement. It then alleged, that the time for making the award was enlarged by mutual consent, and that within the enlarged time the arbitrators duly made their award in writing, whereby they ordered that the defendants should, on the delivery of that award, well and truly pay, or cause to be paid, unto *Thomas Escolme Fisher*, attorney of the plaintiff and *Edward Thorp*, the sum of 16*l.* 12*s.*, his bill already delivered, and the amount

To a declaration on an award, the defendants pleaded, that by an agreement to which they, who were the churchwardens and overseers of a parish, were parties of one part, and the plaintiff and one *E. T.*, farmers in the parish, of the other part, reciting that, in a rate for the relief of the poor, the plaintiff and *E. T.*, conceiving themselves to

be overrated for certain property in proportion to other parishioners, had given notice to the defendants of their intention to appeal; that the defendants intended to defend the same; but that, as both parties had agreed to refer all matters in difference, no appeal had been entered; and that, to determine on the propriety of the rate, so far as regarded the plaintiff and *E. T.*, they had agreed to refer the various matters in difference to three arbitrators: it was witnessed, that the defendants, so far as they lawfully might or could, as churchwardens and overseers, and also the plaintiff and *E. T.*, respectively, agreed to abide by the award of the arbitrators, who were to award upon those matters in difference, as to the expenses of that agreement, and also as to the costs of the award; the plea then set out the award *verbatim*, which directed the defendants to pay to *T. E. F.*, the attorney of the plaintiff and *E. T.*, 16*l.* 12*s.*, his bill already delivered, and also his further costs of attending the arbitration, &c.; that they should pay to Messrs *A.* and *L.* 20*l.* 4*s.* for their costs in attending the arbitration, &c.; that they should pay to Messrs *A.* and *L.* 57*l.* 19*s.*, for the expenses of the arbitrators; and that the defendants should deduct from all future rates charged upon the plaintiff, 10*s.*, and return him 10*s.* for every rate he had paid while the scheme was in operation: and as to the quantity of a lake occupied by the plaintiff, which was in dispute between them, they ordered the rate to be altered by the parish according to the schedule annexed to the award; and lastly, as to *E. T.*, they ordered the defendant to repay him for every past rate, and to deduct from every future rate, 5*s.*; and the plea concluded thus:—"and the defendants in fact say, that the award is void and bad in law, and this they are ready to verify," &c. On special demurrer to this plea, on the ground that the plea referred to the jury what ought to be decided by the Court:—*Held*, by Lord *Abinger*, and *Bolland*, B., that the plea was good in form, but bad in substance, because the submission and award were void, as the principal matter referred could not legally be referred by the defendants, as parish officers; that the parish were not bound by the decision of the arbitrators, nor the defendants as parishioners, nor any other of the parishioners; that the award being void with respect to the principal matter referred, it was also void as to the costs; and that the award left one of the principal matters in so much doubt that the parties could not have the benefit of it.

Parks, B., held that the plea was good in form and substance, and that the award was divisible; that though the defendants could not be compelled to perform the first part of the award respecting the rate, yet that the award was good, so far as it directed the defendants to pay the costs occasioned by the appeal, &c., and of the award; that the fact of the quantity of the lake occupied by the plaintiff not being settled by the arbitrators, but directed by them to be measured by the parish, was not material; and that the amount of the attorney's costs, which the plaintiff alone was liable to pay, might be fixed by evidence.

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of the costs and charges of the said *T. E. Fisher* attending that arbitration and of the procuring the signatures of his said clients and the other parties to the said enlargement of time; and they did thereby further direct that the said defendant should deduct from the amount charged upon the plaintiff in all future rates the sum of 10*s.* of lawful money of *Great Britain and Ireland*, and return to him, the plaintiff, the sum of 10*s.* of lawful money aforesaid, for every rate granted and paid by him the plaintiff since the then scheme had been in operation; that the defendants had notice of the award, which was delivered to them; and the following breaches of the agreement were then stated:—that the defendants have not paid to the said *T. E. Fisher* the said sum of 16*l.* 12*s.*, his said bill delivered, or any part thereof; and that although the costs and charges of the said *Thomas Escolme Fisher* attending the said arbitration, and of procuring the signatures of his said clients and the other parties to the said enlargement of time, amounted to a large sum, to wit, 4*l.* 18*s.* 6*d.*, whereof the defendants afterwards and after the making and delivery of the said award, to wit, on &c., had notice, and were thereupon requested by the said *T. E. Fisher* to pay him the same, yet they did not pay the same; and further that, although before the making and entering into the said first-mentioned agreement, divers, to wit, one hundred rates, had been granted and paid by the plaintiff since the scheme existing at the time of the making the said award had been in operation, so that under and by virtue of the said award the defendants became liable to return and pay to the plaintiff a large sum, to wit, 50*l.*, being the sum of 10*s.* for every rate so granted and paid as aforesaid, of which premises the defendants afterwards, and after the making and delivery of the said award, to wit, on the 16th of *May*, 1834, had notice, yet the defendants have not, nor hath either of them, as yet, re-

turned or paid to the plaintiff the said sum of 50*l.*, or any part thereof, &c.

Plea.—The defendants say, that the said agreement in the declaration first above mentioned was and is in the words following:—[Here the agreement to refer was set out *verbatim*; the purport of it sufficiently appears from the recital of the award. The plea then proceeded as follows:] And the defendants further say, that the said supposed award in the declaration mentioned was and is in the words following: that is to say, Whereas, by a memorandum of agreement bearing date &c., and made between *Simon Cole* and *Thomas Mehew*, churchwardens of the parish of *Holywell-with-Needingworth*, in the said county, and *Thomas Haslop* and *Jonathan Miles Weston Flood*, overseers of the poor of the said parish, of the one part, and *William Thorp*, of the same place, farmer, and *Edward Thorp*, of the same place, of the other part, reciting that on or about the 30th day of *January* last past, a rate was made and allowed for relief of the poor of the above-named parish, and the said *William Thorp* and *Edward Thorp* were respectively rated for several messuages, cottages, lands, pasture closes, and garden ground there, in aid of the said rate, and reciting that the said *William Thorp* and *Edward Thorp*, conceiving themselves to be over-rated for such property, and much more in proportion than several other parishioners named in their respective notices of appeal hereinafter mentioned, for their messuages, lands, and hereditaments there, and conceiving the said rate in many other respects to be unjust, unfair, and partial, did, on the 26th of *March* last, give a notice to the above-named churchwardens and overseers of their respective intentions of appealing at the next general quarter sessions of the peace for the county of *Huntingdon*, against the said rate or assessment, and alleging in their respective notices certain specified grievances and

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grounds of complaint; and the said churchwardens and overseers, believing the said rate to be a fair and equal rate, did intend to defend the same, but in consequence of the said parties hereto agreeing to leave the examination of the said rate and all matters in dispute between them, as stated in the said notices, to arbitration, as hereinafter mentioned, no appeal was entered with the clerk of the peace for the said county against the said rate, as by law is required; and reciting, that the said parties, in order to put an end to all further expenses, and to prevent litigation respecting such poor's rate, and in order to settle and ascertain the subject of the poor's rate, and the equality or inequality thereof, so far as the same relates to the charges therein made on the said *William Thorp* and *Edward Thorp* respectively, as compared with the rate made on the property occupied by *Simon Cole*, *Samuel Thorp*, *Richard Daintree*, *Joseph Crocen*, and several other persons named in the said notices of appeal, and all things relating thereunto, to the order, arbitrament, and final award of us the said *William Abbott*, *Robert Daintree*, and *Thomas Bowyer*; and it is by the now reciting memorandum of agreement witnessed that the said *Simon Cole*, *Thomas Mehew*, *Thomas Haslop*, and *J. M. W. Flood*, so far as they lawfully might or could, as such overseers and churchwardens, did thereby for themselves and their successors, and they the said *William Thorp* and *Edward Thorp* did thereby for themselves severally and respectively, and for their several and respective heirs, executors, and administrators, mutually promise and agree to and with each other, that they the said churchwardens and overseers, and the said *William Thorp* and *Edward Thorp*, and each and every of them, should and would from time to time, and at all times thenceforth, obey, abide by, perform, fulfil, and keep the award, order, final end, and determination of us the said *William Abbott*, *Robert Daintree*, and *Thomas*

Bowyer, or any two of us, elected and named as aforesaid by the said parties in difference, to award, order, and determine of and concerning the above-mentioned matters in difference, and of and concerning all and every the costs, charges, and expenses of the now reciting memorandum of agreement, and of the counterpart thereof, and of the said notices of appeal, and of the said churchwardens and overseers in consequence of such notices of appeal, and of their preparation to resist such appeals and to support the said rates, and of all and every matter relating thereto respectively, so that we the said arbitrators should make and publish our award, order, or determination of and concerning the premises, in writing, under our hands, ready to be delivered to the said parties, or to either of them, requiring the same, on or before the 5th day of *May* next ensuing the date thereof; and the said parties thereto did further agree that the costs of this arbitration and award to be made in pursuance thereof should be in the discretion of us the said arbitrators, or such two of us as might give in our award concerning the same, who should award by whom, and to whom, and in what manner the same should be paid; and it was by the now reciting memorandum of agreement further agreed by and between all the said parties to the now reciting agreement that the now reciting agreement and submission to arbitration should be made a rule of his Majesty's Court of *King's Bench* at *Westminster*, to the end that the said parties in difference should be finally concluded by the said arbitration by these presents intended, pursuant to the statute in such case made and provided. And whereas we have, by consent of the said parties, enlarged, by writing under our hands, the time for making our award unto the 5th day of *June*, 1834, Now know ye, that we the said *William Abbott*, *Robert Daintree*, and *Thomas Bowyer*, having taken upon ourselves the burthen of the said reference, and having been attended by the said parties and their respective attor-

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mies, and having examined and duly considered the allegations, vouchers, proofs, and evidence of the said parties respectively, do make and publish this our award in writing, of and concerning the matters to us referred, as follows: that is to say, we do hereby award, adjudge, and declare, that the said *Simon Cole*, *Thomas Mehew*, *Thomas Haslop*, and *J. M. W. Flood*, their executors or administrators, shall, on delivery of this our award, well and truly pay, or cause to be paid, unto *Thomas Escolme Fisher*, attorney of the said *William Thorp*, and *Edward Thorp*, his executors or administrators, the sum of 16*l.* 12*s.*, his bill already delivered, and the amount of the costs and charges of the said *Thomas Escolme Fisher* attending this arbitration and of the procuring the signatures of his said clients and the other parties to the said enlargement of time; and we do further award, order, and direct, that the said *Simon Cole*, *Thomas Mehew*, *Thomas Haslop*, and *J. M. W. Flood*, their executors or administrators, shall on the same day well and truly pay, or cause to be paid, unto Messrs. *Allpress & Lawrence*, the sum of 20*l.* 4*s.* for the costs and charges of the said Messrs. *Allpress & Lawrence* attending this arbitration, and of the said recited memorandum of agreement entered into between the said parties; and as to the charges of us the arbitrators, and the costs and charges of our award, we do further award, order, and direct, that the said last-mentioned *Simon Cole*, *Thomas Mehew*, *Thomas Haslop*, and *J. M. W. Flood*, shall forthwith, on delivery of this our award, pay the sum of 57*l.* 19*s.* to the said Messrs. *Allpress & Lawrence* at the time aforesaid; and we direct that the said *Simon Cole*, *Thomas Mehew*, *Thomas Haslop*, and *J. M. W. Flood*, do deduct from the amount charged upon the said *William Thorp* in all future rates the sum of 10*s.* of lawful money of *Great Britain and Ireland*, and return to him, the said *William Thorp*, the

sum of 10s. of lawful money aforesaid, for every rate granted and paid since the present scheme has been in operation; and we do further direct, that, as a dispute is made with regard to the quantity of the lake occupied by the said *William Thorp*, that the quantity shall be ascertained by the parish, and the rate altered accordingly, agreeably to the price per acre as set against the said lake by us in schedule A. And we do hereby direct, that the said *Simon Cole*, *Thomas Mehew*, *Thomas Haslop*, and *J. M. W. Flood*, do deduct from the amount charged upon the said *Edward Thorp*, in all future rates, the sum of 5s. of lawful money aforesaid, and return to him the sum of 5s. of lawful money aforesaid for every rate granted and paid by him the said *Edward Thorp* since the present scheme has been in operation. As witness our hands, this 14th day of May, 1834—*William Abbott*, *Robert Daintree*, *Thomas Bowyer*. And the defendants in fact say, that the award is bad and void in law; and this they are ready to verify, &c.

Special demurrer;—alleging for causes, that the said award is a good and sufficient award in law; and also that the plea is bad, inasmuch as it attempts to put in issue, to be tried by a jury, matter of law, namely, the sufficiency or insufficiency of the said award; and also that the defendants, instead of pleading the insufficiency of the said award, should have demurred.

Erle, in support of the demurrer.—The plea is clearly bad, for the first special cause stated in the demurrer, that it concludes to the country instead of to the Court; the question therefore is, whether sufficient is stated upon the declaration to maintain the action. The breaches alleged in the declaration are, that the defendant has not paid to *Fisher* 16*l.* 12*s.*, the sum awarded to him by the arbitrator, nor the sum of 4*l.* 18*s.* 6*d.*, the costs attending the arbitration; but, an objection is taken to the award, that the

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churchwardens and overseers, having no power to bind the parish upon the question respecting the property of the *Thorps*, the award is void as to that part, and therefore void as to the rest; but without discussing the question, as to whether the award is good or not in that respect, and even supposing the award to be not binding as far as the question of the rate is concerned, it is at all events good so far as the costs are concerned. Three things are agreed to be referred—*first*, the inequality of the rate; *secondly*, the costs incurred in preparing for an appeal, which was mutually agreed to be abandoned; and, *thirdly*, the costs of the reference. With respect to the first, the award is sufficiently mutual, because both parties agreed to give up something; and as both parties must be supposed to be cognizant of the law, the agreement to refer the question to a private tribunal, instead of the quarter sessions, must be taken to be binding on both. The parties cannot now be placed in the same situation as they were before, because it is too late now for the plaintiff to appeal against the rate; and though it may have no effect as an award, yet it would be of considerable value and importance to the defendants and the parish. The award can now be performed by the defendants in all respects, if they think proper to do so.

Lord ABINGER, C. B.—What right would the plaintiff have had to the costs of the appeal against the parish officers, either by indictment or action, or any other way? Could the arbitrators order the parish officers to pay those costs out of their own pockets?

Erle.—They might be personally liable, unless they acted by order of vestry; and if an order of vestry had been properly obtained, they might have charged the costs to the parish. *Rex v. Inhabitants of Micklesfield* (a)

(a) Caldecott, 507.

is an authority to shew, that if parish officers proceed in a suit and incur costs, without the concurrence of the vestry, they are personally liable. At all events, if the defendants are unable to perform one part of the award, they can perform the other part of it; the costs incurred about the appeal, and the notices, was a question in dispute, and as both parties must be supposed to know the law, if no legal decision could be come to by the arbitrators upon the question relative to the goodness of the rate, they must be supposed to have agreed to take the best decision of the arbitrators upon that question that could be come to. It must be considered as an agreement to take the opinion of the arbitrators as to what was or was not the proper mode of rating: it is too late, therefore, now for the defendants to say, after they have obtained the decision of the arbitrators upon the question, that they have no authority to refer that question; it was entirely their own act. But the award is divisible, and may be good in part, and bad in part; there is no objection to that part of the award upon the question respecting the costs which had been incurred, and which is all that the plaintiff seeks to enforce.

Kelly, contra.—The declaration is bad, because it appears by the submission there set out, that the most important of the matters agreed to be referred could not legally or effectually be referred, and the award as to that is clearly void; and as the other matters referred were merely incidental to the principal matter, the whole award is void. It cannot be assumed that both parties knew the law; unless the plaintiff can prove the whole of the consideration stated in the declaration, he must be nonsuited. Here, the most material part of the consideration fails; if a party is bound to do three things, and he cannot perform one of them, the promise is gone.

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LORD ABINGER, C. B.—If the consideration fails as to part, the promise goes also; but where a man agrees to perform three things, and one he cannot do, that does not absolve him from performing the other two. There is a difference, where part of the agreement is to do any thing illegal, or immoral, and where it is to do a thing impossible. Securities given for gambling debts are void, and therefore, it has been held that if a security be given for a gambling debt, and something else to which there is no objection, yet the whole is void.

PARKE, B.—In construing the contract, we must suppose that both parties knew the law. The contract is, that so far as by law they may, they do bind themselves to perform the award when made; the making of the award on all the matters in difference was a condition precedent, which has been performed. The arbitrators have, in fact, decided what ought to have been binding on either party. Here, there is nothing illegal or impossible; the defendants can do all that they are directed to do; but they say that they are not bound to do it, and the Court say so too, so far as part of the award is concerned; but what objection is there to their performing the other part of the award? Suppose a person, in consideration of several things, agrees to do something; four out of five are worth nothing, and the fifth is a valuable consideration; is he not bound to perform his agreement? It was decided this term that he was (a).

Kelly.—The award is bad upon another ground, because it is not mutual. The case of *Biddell v. Douse* (b) is an authority in favour of this objection; there, there was a reference to arbitration by several persons, some of whom were infants, and the declaration did not shew that there was a binding submission on their part; and on that

(a) *King v. Sears*, T. T. 1835,
Exch., 2 Cr. M. & R. 48.

(b) In error, 9 Dowl. & Ry. 404;
6 B. & C. 255.

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ground the declaration was held bad, because it did not shew a submission binding on all parties. If an award fails as to any essential part, either through illegality or otherwise, great injustice would ensue, if the award could be enforced as to the residue. Here, the costs are incidental to the principal matter, and therefore must fall with it. It might as well be contended, where an action is referred and also the costs, that if the award as to the action should fail, yet it would be good as to the costs. There is another objection to the award as regards the 16*l.* 12*s.*: the submission is of and concerning all and every the costs, charges, and expenses of this agreement, and of the counterpart thereof, and of the said notices of appeal, and of the said churchwardens and overseers, in consequence of such notices of appeal, and of their preparation to resist such appeal, and to support the said rate, and of all and every matter relating thereto respectively. The award is, that the defendants shall, on delivery of the award, pay to *Fisher*, the attorney of the said *W. Thorp* and *E. Thorp*, the sum of 16*l.* 12*s.*, his bill already delivered, and the amount of the costs and charges of the said *T. E. Fisher* attending the arbitration, and of the procuring the signatures of his said clients and the other parties to the enlargement of time. There is nothing to shew what was included in that bill, whether it contained the charges for the agreement and counterpart, and of the notices of appeal, and of the churchwardens and overseers, or of any or which of those charges, or whether they were the plaintiff's costs or *Edward Thorp's* costs; and therefore the award as to that is uncertain, and it does not appear whether all the matters in difference have been adjudicated upon.

PARKE, B.—If there is any thing omitted which ought to have been awarded upon, there should have been an averment in the plea to that effect, otherwise you must make an intendment against the award that it does not

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include all the costs upon which the arbitrators were required to adjudicate.

Kelly.—The plea sets out the whole of the award, and the Court can look to that part of it which shews that there was no award as to the costs of the agreement or counterpart, because it goes on afterwards to direct how the costs of the award shall be paid.

Erle, in reply.—The plea being demurred to, the Court can only look at the declaration. The only averment in the plea is, that the award is void, and that question is submitted to the jury instead of to the Court. Without relying however on that objection, but looking only to the award, it clearly appears that all the costs are awarded upon. As to the case of *Biddell v. Douse*, some parties being infants, there was no binding submission; and Lord *Tenterden*, in his judgment, observes, that it could not be said whether the interests of the infants were affected by that award. Here, on the contrary, all parties were *sui juris* and competent to refer; both parties had been put to preparatory expense, and agreed to forego an appeal, and refer that question with others to arbitration; and, having obtained a good award upon the matters referred, both parties ought to abide by it.

Cur. adv. vult.

The learned Barons who were present at the argument differing in opinion, delivered their judgments in *Trinity Term*, *seriatim*, as follows:—

BOLLAND, B.—The question in this case is raised by a demurrer to the plea. The action was brought by the plaintiff on an award, and it will be necessary for me to refer fully to the pleadings. [His Lordship here stated the substance of the declaration, plea, and demurrer, and

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proceeded thus:—It does not appear to me that the plea is objectionable, either in substance or form; and the question which the Court has to decide is, whether the award can be supported; and I am of opinion that it cannot, as much the greater part of the subject-matters referred are such as the parties could not, by any agreement between themselves, without the intervention and authority of the justices in quarter sessions, submit to the decision of arbitrators. I am aware that appeals against poor rates, where the matters in dispute can be more satisfactorily discussed and inquired into before a private tribunal, are frequently, by the consent of the parties litigant, and with the sanction of the justices, after such appeals are entered, referred to a competent person or persons, to make his or their report to the Court, to give it information, and to guide its judgment; but the magistrates only can decide between the parties. *Rex v. The Justices of Northampton (a)*, *Rex v. Natland (b)*. In the case before the Court, the plaintiff appealed against the rate, not on the ground solely of being overrated for the property in his occupation, with reference only to the value of that property, but his further complaint was, that he was overrated in comparison with, and in respect to, the sums at which other persons named in his notice of appeal were assessed; those persons were no parties to the reference; the award of the arbitrators could not be binding upon them; and as I am of opinion that the arbitrament could not in law be made available in favour of the plaintiff, either as against the churchwardens and overseers—the defendants, the parishioners then being, or future parishioners, the successors of the defendants in office, the award cannot in any part be supported, but is in my judgment altogether void. There is no sufficient consideration for the promise alleged in

(a) Cald. 30.

(b) Burr. S. C. 793.

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the declaration. Nothing appears to shew a legal obligation to abide by and perform the award: such legal obligation must arise out of a valid and competent submission to the authority of the arbitrators, and that authority does not exist here. Upon this point the case of *Biddell v. Douse* (a) is a well considered and decisive authority. For the above reasons, I am of opinion that the defendant is entitled to judgment.

PARKE, B.—The plea is good in point of form and substance. It admits the submission and award, so far as stated in the declaration, but sets out both at full length, and thereby raises the question, whether the award be valid in law. The conclusion, which is objected to as referring matter of law to the jury, is either the statement of an inference of law from the premises, as if it had said “and so the defendants say that the said award is bad and void in law,” or it may be rejected as surplusage.

The question then to be decided is, whether the award, compared with the submission, be void altogether.

The submission is of three things:—*First*, the examination of the rate and all matters in dispute, as stated in the notices of appeal; the object being to settle and ascertain the subject of the poor's rate, and the equality or inequality thereof, so far as relates to the charges on *William Thorp* and *Edward Thorp* respectively, compared with other individuals named in the notices of appeal; *secondly*, the expenses on both sides of the agreement, counterpart, and notices of appeal, and preparations to resist the same; and there is the usual clause—so that the arbitrators shall make their award and determination of and concerning *the premises* (which include both these matters) at a certain time; and, *thirdly*, there is an agreement that the costs of the

(a) 9 Dowl. & Ry. 404; 6 B. & C. 255.

arbitration and award shall be in the discretion of the arbitrators.

It was argued by the learned counsel for the defendants, that the whole award was void, because the churchwardens and overseers had no power to bind themselves, or the magistrates, at quarter sessions, or the parishioners, existing or future, by such a submission; and that the submission and award were in this respect wholly nugatory; and the other question being merely ancillary to this, the whole award was void.

On the part of the plaintiff, it was not disputed that neither the churchwardens and overseers, nor the magistrates, nor parishioners were bound in this respect by the award; but it was nevertheless insisted, that the award was good as to the other matters in difference; that, in construing contracts, the parties to them must be assumed to be cognizant of the law; that no binding settlement of the rate could be made by the arbitrators; and that they must, therefore, be intended to have submitted that question only so far as by law it could be; and that the special manner in which the defendants have bound themselves, is a confirmation of that view of the case. The defendants, therefore, must be taken to have agreed, in consideration of the plaintiff and *Edward Thorp* agreeing to withdraw their notices of appeal, and jointly employing the arbitrators to make a valuation of the property in the rate, so far as related to the comparative amount assessed on the plaintiff and the other persons named, to abide by their award on the question as to the costs of preparing to litigate the rate at the quarter sessions, and the expenses of the agreement to refer, and reference; and it is contended that such a contract is good in law.

It appears to me, that this view of the case is right, and that the agreement of submission is valid and binding, for the reasons thus stated in the argument on behalf of the plaintiff.

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There is no doubt, that, if the parties had both agreed to withdraw the notices of appeal, and to abandon all objection to the validity of the rate, they might also have agreed to leave to arbitration the question which of the parties should pay the expenses of the preparations for the appeal; and if this be a fit subject of reference, can such a one be rendered invalid, by uniting with it an agreement that the arbitrators are to make a valuation for their information and guidance? I should say it cannot. The case of *Biddell v. Douse* is distinguishable. There, some parties to the reference were not bound at all; and unless they were, there was no mutuality. Here, they were bound on both sides; both have agreed; and the only question is, what is the meaning of the contract between them? and I must say, that I think the reasonable and proper construction of the contract is, not that the arbitrators shall do what both parties must know to be by law impossible, but that which they can do; that is, merely make a valuation, as a guide to the parties for their future conduct. This is the only doubtful part of the contract, for the residue is clear, and admitted on both sides, viz. that they shall determine and decide the other questions. I am of opinion, therefore, that the award is not void on this ground.

In the course of the argument, however, two other objections were suggested at the bar or by the Court, which at the time appeared to me to be of considerable weight; but, on subsequent reflection, I do not think they ought to prevail.

First, it was stated, that the submission is conditional, with an *ita quod*, so far as relates to the settlement of the rate, and to the expenses of the agreement and notices of appeal; and admitting that the construction which I have put on the submission was correct, and that the churchwardens and overseers are not and could not be legally bound by the settlement of the rate by the arbi-

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trators, and that the award is, therefore, as to its legal consequences in this respect, void; yet, it is said, that the final settlement of the rate, in respect of the proportions mentioned, by a complete and perfect valuation, is a matter which the parties have stipulated for, and made their submission to the award in every respect conditional on such a valuation being in fact made, and the other questions submitted finally determined; and it is said, that such complete and perfect valuation has not been made; for it appears by the award, that they have left the quantity of the lake occupied by the plaintiff, on which the amount of the rate in part depends, unsettled. But I think that the construction of this part of the award, which is set out in the plea, unexplained by any averment on the record, is, that the whole lake is occupied by the plaintiff, and the only matter referred is its measurement, which is a mere ministerial act, and which, even where a matter is referred to be finally decided by arbitrators, and not simply a valuation to be made, may be delegated to another. *Winch & Saunders's case (a)*. The award, therefore, appears to me not to be void in this respect.

A second objection was, that the award is void, as the amount of the costs to be paid by the defendants, on account of the plaintiff's expenses of the notices of appeal, as well as of the agreement or counterpart, is unascertained. The award directs the defendants to pay to *T. E. Fisher*, the attorney of the plaintiff, and *Edward Thorp*, the sum of 16*l.* 12*s.*, his bill already delivered, and also *Fisher's* charges attending the arbitration, and of procuring the signatures of his clients and the other parties to the enlargement of time, which latter charges are not ascertained. As there is a stipulation that the submission is to be made a rule of the Court of *King's Bench*, the

(a) 2 Roll's Rep. 214.

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amount of these last costs may be taxed ; and therefore it is no objection that they are not settled by the arbitrators themselves. And as to the bill of *Fisher* for 16*l.* 12*s.*, that must be considered as being on account of costs relating to the notices of appeal ; because, as the award is made *de premissis*, and the context shews the costs of the agreement and of the reference not to be included in the 16*l.* 12*s.*, the Court ought to intend that this sum is for one of the matters submitted, and therefore is for the costs of the notice, according to the rule laid down in *Rose v. Spark (a)*, that these words have the effect of applying the general words of the award to the particular things submitted ; and though the amount of the plaintiff's share of that sum is unascertained, yet, as the 16*l.* 12*s.* is stated to be for a bill already delivered, the sum due from the plaintiff to his attorney might easily be ascertained by reference to the bill ; and therefore, the award is sufficiently certain in this respect.

I am therefore of opinion, that the plaintiff is entitled to judgment.

Lord ABINGER, C. B.—I am of opinion, that in this case the plea is good, and that the award and submission are bad. I shall give the grounds for my opinion very shortly. The submission to arbitration recites, that the plaintiff, conceiving himself to be overrated by means of the rate made upon him, had given notice of appeal, specifying in such notice the grievances complained of. The parties entered into an arrangement on this occasion. Now, I do not mean to state, that, if the notice of appeal had been withdrawn upon collateral grounds, and the question of costs had been the only remaining question to be decided between the parties, that question might not have been referred to some arbitrator to ascertain what

(a) *Alleyn*, 51 ; 1 *Saund.* 324.

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was the amount of the costs which each party ought to pay; but, in this case, the agreement of submission to arbitration shews, that the cause of difference was a cause which could not be made the subject of a submission to arbitration, because it recites it to be the amount of the rate, and that it is which these parties propose to refer, and which the churchwardens and overseers consent to refer, so far as in law they can. It appears to me, that the costs are merely incidental to the subject-matter in dispute; they arise incidentally out of the general subject-matter of the reference. Now, it can never be supposed that a party intends to bind himself by an arbitration respecting a matter incidental to that which was the real point in dispute, when the latter wholly fails. It has always appeared to me, that a submission to arbitration is in the nature of a contract founded on a consideration of a final and valid determination of all the matters described in the bond of submission; and therefore I have always been of opinion that if the main part of the object of the arbitration fails, either by its being illegal to refer it, or by reason of any other cause of failure, then the whole submission is void. That doctrine is the foundation of the decision which has been referred to in *Biddell v. Dowse*. It is very true that that case is not exactly similar to this, but the principle is the same. It was there determined, that, as the object of the parties could not be obtained by the reference, by reason that certain infants ought to have been made parties who could not be so made by law, the object the parties had in view failed, and therefore the whole submission was void. This was distinctly laid down in that case, and that principle is applicable to the present case; the parties here intending, so far as they could, to refer that, which it turned out was not in law capable of a reference, namely the rate. The costs incidentally arising out of the matter submitted, never could have been meant to have been made the subject-matter of reference alone.

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The consideration for the submission therefore fails. If a man refers all matters in difference, and it turns out that they are not properly referred, the submission is a nullity, and he is not bound by the award. On these grounds, I think the submission to arbitration is void. I think also that the award itself is bad. It directs that the churchwardens and overseers shall return 10s. back on each rate, and goes no further: that is clearly not binding upon them; they cannot do it by law, and there is no power to make them obey it at all. The award on this, therefore, is of no avail; and yet this is a material point referred. Then the arbitrators direct, that the quantity of the lake occupied by the plaintiff should be ascertained by the parish, and the rate altered accordingly. That, I think, might not of itself vitiate an award. But this is a point which is to be ascertained by the parish. Now, what is the meaning of the word "parish?" That is left in doubt. It may mean the churchwardens and overseers; or it may mean that the parishioners themselves are to make the settlement. It seems to me, the matter is left so much in doubt, that it cannot entitle the parties to any benefit from the award of the arbitrators. Supposing the parish were disposed to accede to the adjustment pointed out by the arbitrators, the parties cannot have the benefit of the award, as the parish are no definite persons, and could not set out the quantity of the property occupied by the plaintiff. It is said by my Brother *Parke*, and undoubtedly if that were so, I could go along with him, that he considers this, substantially, as only an agreement to refer the matter in dispute to the arbitrators, to make a valuation of the property in the lake on which the rate is to be made, which may be afterwards adopted by the parish officers or not; but the proper mode of making a valuation of a parish, is to assess the parishioners equally; and if there be any dispute as to the rate, the quarter sessions ought to settle it. It is a common practice to arrest the adjudication at ses-

sions, until the parties have an opportunity of making a new valuation; but the validity of that depends on the sessions adopting it, and not upon the opinion of an arbitrator. I do not think that this was a subject on which an arbitrator was competent to award. On these grounds it appears to me the award is bad, and that judgment ought to be for the defendants.

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Judgment for the defendants.

CASLEY, Assignee, v. SMYTH.

THIS was an action on a bail-bond by the plaintiff, as assignee of the sheriff of *Warwickshire*. A rule *nisi* for setting aside the proceedings having been obtained by *Miller* on behalf of the defendant,

"*Casley, assignee, &c.*," is not a sufficient description of the plaintiff in the title of an affidavit.

Humfrey, on shewing cause, objected that the affidavit in support of the rule, was improperly intitled "*John Casley, assignee, &c.*," instead of stating of whom he was assignee; and he cited *Phillips v. Hutchinson*, in the Bail Court (a), where the same objection was taken, and *Littledale, J.*, held it to be a good objection, and refused to allow an amendment.

Miller was heard against the objection.

Per Curiam.—The rule must be discharged.

Rule discharged, with costs.

(a) Ante, Vol. 3, p. 20.

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The Writ of Trial Act was only intended to apply to very plain questions; and after a Judge at chambers has refused to make an order, *semble*, that the Court will not entertain a motion for reviewing his decision; not, at least, unless all the facts of the case, with what took place before the Judge, are brought specially before the Court.

THIS was an action of debt for work and labour, &c. The debt was 9*l*. The defendant had pleaded,—*first*, never indebted; and, *secondly*, that the work was done, and materials provided, under an agreement that all was to be done gratuitously. An application was made to a Judge at chambers, under the Writ of Trial Act, that the cause might be tried before the under-sheriff of *Carmarthen-shire*; but the learned Judge refused to make an order. The objection made was, that the custom of the country might come in question, and that it was a difficult cause to be tried in point of fact.

Chilton now renewed the application, under the same circumstances; and urged that as the debt was so small, and the difference of expense would be considerable, it was a proper cause to be tried before the under-sheriff.

ALDERSON, B.—We should defeat the object of the act if we were to allow motions of this sort. The object of the act was to save expense. It is a question which is absolutely in the discretion of the Judge.

Chilton.—The words of the act (*a*) are, that “if the Court or Judge shall think fit,” &c.

ALDERSON, B.—No doubt, if this had been an original motion the Court must have heard you; but the act gives an option, which has been exercised; it gives no power to apply both to a Judge and to the Court.

(*a*) 3 & 4 Will. 4, c. 42, s. 17.

PARKE, B.—The act was only intended to apply to plain questions. This may be a fit cause for the assizes; and if it was intended to bring the opinion of the Judge at chambers before the Court for re-consideration, what took place before the Judge at chambers ought to be brought specially before the Court. Another application had better be made at chambers.

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GURNEY, B., concurred.

Rule refused.

CHARRINTON v. MEATHERINGHAM and Another.

HUMFREY had obtained a rule *nisi* for discharging a rule which had been obtained by the defendants for judgment as in case of a nonsuit, and for enlarging the peremptory undertaking which had been given by the plaintiff until the next *Spring Assizes*.

Though a rule absolute for judgment as in case of a nonsuit has been obtained for not proceeding to trial pursuant to a peremptory undertaking, yet if it appears to have been through mistake that notice of trial was not given in time, and no inconvenience has been sustained by the defendant in consequence, the Court will discharge the rule on payment of costs.

Miller shewed cause; and from the affidavits it appeared that the action was brought against the defendants as overseers of the poor and constables of the parish of *Holbeach*, in *Lincolnshire*, for acts done by them in execution of warrants of certain justices of the peace of the county, requiring them to levy upon the plaintiff's goods; that the action was commenced in *June*, 1833; that the plaintiff had been forced on at every step by the defendants; that in *Hilary Term*, 1835, a rule for judgment as in case of a nonsuit having been obtained, for default in not proceeding to trial at the previous assizes, it was discharged, upon the plaintiff's undertaking peremptorily to try at the next assizes, unless the time was extended by a Judge's order. The time was afterwards extended to the Summer Assizes; and notice

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of trial not being given in time, it was returned, and in *Michaelmas* Term a rule absolute in the first instance for judgment as in case of a nonsuit obtained. The costs had been taxed before this motion was made. It was submitted that, under these circumstances, the Court would not allow this motion, especially in an action against parish officers.

Humfrey.—Notice of trial was given, but it was a little too late; and as it is sworn to have occurred in the hurry of business, the Court will grant relief upon payment of costs.

PARKE, B.—No inconvenience appears to have been sustained by notice of trial not having been given in time; and therefore I think, that, on payment of costs, the rule ought to be absolute.

The rest of the Court concurred.

Rule absolute on payment of costs.

CHALKLEY v. CARTER.

The omission of the words "on promises" in a writ of summons is only a ground of setting aside the copy served, and not the writ itself.

The entry of an appearance by a plaintiff for a defendant does not operate as a waiver of an objection to the copy of the writ.

THOMAS moved to set aside an order of Mr. Justice *J. A. Park*, by which he ordered the writ of summons which had been issued against the defendant to be set aside with costs. It appeared that the writ was served upon the defendant on the 12th of *October*; and the defendant not entering an appearance, the plaintiff entered an appearance for him on the 21st. A summons was afterwards taken out for setting aside the writ on the ground of irregularity; and upon the 23rd of *October* the parties appeared before Mr. Justice *Park*, and the copy served was

produced, and the objection taken was that the words "on promises" were omitted in it. On the other hand it was contended, that this defect in the copy did not warrant the learned Judge in setting aside the writ, which might be good, and that the summons should have been to set aside the copy; and, *secondly*, that the application was too late, another step having been taken, by the plaintiff having entered an appearance. The learned Judge, however, made the order in the terms prayed. The same objections were now renewed, and the Court granted a rule *nisi*.

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Martin shewed cause.—The copy served was incorrect, and the defendant was not bound by the appearance entered by the plaintiff. Then the question having been submitted to a Judge, who has decided upon it, both parties are concluded; the rule of *Michaelmas Term* (a) gives the defendant leave to apply to the Court or a Judge. It must now be supposed, that the Judge was satisfied that the writ was also wrong, for the paper served professed to be a copy; and it does not even now appear that there was not the same defect in the writ: upon an application like the present, it ought to be clearly shewn that the Judge's order was wrong.

Thomas, in support of the rule.—The objection was taken at chambers that there was nothing to shew that the writ was wrong; and the application also was too late, within the spirit of the 33rd rule of *H. T. 2 Will. 4* (b), which is express that no application to set aside proceedings for irregularity can be made unless within a reasonable time, nor after a fresh step taken by the party applying. The appearance entered by the plaintiff was an act done on the defendant's behalf.

(a) *Michaelmas Term*, 3 Will. 4, s. 10, ante, Vol. 1, p. 473.

(b) Ante, Vol. 1, p. 187.

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PARKE, B.—That rule only applies to the party's own act. The appearance was irregular; but the mistake in the copy did not warrant the order for setting aside the writ, and the distinction was pointed out at the time. The rule must be absolute for setting aside the learned Judge's order.

Rule absolute.

GOUGENHEIM, a Pauper, v. LANE and Others.

A pauper plaintiff in an action of trespass, who gets only a farthing damages, is entitled to full costs, and not merely to costs out of pocket.

Where there are several issues, some of which are abandoned at the trial, the plaintiff is entitled only to the costs of those parts of the briefs, and such of the witnesses as were necessary for the issues on which he succeeded.

The rule of *H. T. 2 Will. 4, s. 74*, does not apply to paupers; and the costs of such of the opposite parties, who have got verdicts, cannot be deducted from the plaintiff's costs of the cause.

Quare, whether the officers are entitled to any fees as against a pauper.

THE plaintiff in this action sued as a pauper. The declaration was in trespass, for assaulting and imprisoning the plaintiff, and contained four counts: the last count was for an imprisonment on the 12th of *October*, 1832. The defendants, six in number, severally pleaded the general issue (*a*). At the trial it appeared, that the plaintiff had been arrested on a *capias*, irregularly issued out of the Sheriff's Court, on the 12th of *October*, 1832, which was afterwards set aside. He had been before arrested on a writ issued on a bad affidavit of debt, which latter writ was also set aside, and he complained of other arrests: but *Davies*, one of the defendants, was only implicated in the last arrest under the *ca. sa.*, and the plaintiff's counsel, on an objection being taken, elected to abandon all the alleged acts of trespass previously to the *ca. sa.* Ultimately, the jury acquitted three of the defendants, and found a verdict against the other three, *Lane*, *Barrowcliff*, and *Davies*, on the fourth count, with one farthing damages; and on the first three counts, which were abandoned, the last three defendants had a verdict. An application was made to Lord *Lyndhurst*, who tried

(a) This was before the new-rules for pleading.

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the cause, to certify to deprive the plaintiff of costs, but his Lordship refused to do so. The plaintiff's attorney made out a bill of costs against all the defendants, to the amount of 110*l.*, and delivered it to *Lane's* attorney, who acted for all the defendants; and upon the taxation, it was objected before the Master, that the plaintiff was only entitled to costs out of pocket, as he had recovered less than 5*l.*, but the Master taxed the plaintiff's costs in the usual way, as the *postea*, he said, gave him 40*s.*, and no authority was shewn for taxing the costs in any other than the usual way. The Master taxed the plaintiff's costs at 81*l.* 12*s.*, from which he deducted 10*l.* 17*s.* 6*d.* as the costs of *Lane*, *Barrowcliff*, and *Davies*, on the first three counts, but he refused to allow any costs to the defendants who obtained a verdict. A rule *nisi* was afterwards obtained by *Erle*, on behalf of the defendants, for a review of the Master's taxation, and that he should be directed to allow the plaintiff his costs out of pocket only, and confine the costs to so much of the briefs, and to such of the witnesses, only, as he should consider were necessary for establishing the imprisonment of the plaintiff and the facts connected with it subsequently to the 12th of *October*, 1832; and also, that the defendants who were acquitted should have their costs deducted from the plaintiff's costs.

Crowder and *Mansel* showed cause.—If the plaintiff had not sued as a pauper, he would have been clearly entitled to costs; and a pauper, when he succeeds, is in the same situation with respect to receiving costs, as any other plaintiff is. In *Rice v. Brown* (a), it was held that a pauper was entitled to receive costs from a defendant for a default on his part, though the plaintiff himself would not be liable to pay costs for his own default; and the

(a) 1 Bos. & P. 39.

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Court denied the authority of a case cited, that the pauper was liable to costs for any default of his, and they said that the only mode of getting costs from him was by dispaupering him. *Blood v. Lee* (a) is to the same effect. There is no authority to show that the recovery of less than 5*l.* makes any difference. *Secondly*, the Master has taxed the costs upon the principle of allowing only such costs as were occasioned in establishing the imprisonment on the 12th of *October*. It was necessary to bring before the jury the first process, which was irregular, and to connect the subsequent arrest on the *ca. sa.* on *October* the 12th, with the previous proceedings. *Thirdly*, as to taxing the costs of the three defendants who were acquitted, and deducting them from the plaintiff's costs, those defendants would certainly be entitled to their costs, if the plaintiff were not suing as a pauper; but the rule of *Hilary Term*, 2 *Will.* 4, s. 74, which directs cross costs to be deducted, only applies where the defendant would be entitled to receive costs from the plaintiff: here, if these defendants had been sued alone, and got a verdict, they could not have had their costs from the plaintiff, and therefore are not entitled to have them deducted, as that would be in effect receiving them,

Erle, in support of the rule, contended, that where a pauper recovered less than 5*l.*, the invariable practice was to tax the costs on a different scale, and give him only costs out of pocket; and that the fact, which was sworn to in the affidavit, that all the public officers had on that account refused their fees for passing the record, sealing subpœnas, and court fees, &c., which they always accepted when the verdict was for 5*l.*, showed that they

(a) 3 *Wils.* 24.

considered that a different practice prevailed in taxing costs where the verdict was for less than 5*l*.

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PARKE, B.—The authorities show that the plaintiff is entitled to receive costs, though he does not pay any: and he is entitled to have his costs taxed in the usual way. If the Judge at the trial thinks the action to be an improper one, he can certify to deprive the plaintiff of costs. It is difficult to see how the officers are entitled to their fees, even if 5*l*. are recovered.

ALDERSON, B.—I think the taxation was correct in this respect.

Erle.—Upon the second objection the Master must review his taxation, because the greater part of the witnesses were quite unnecessary, with the view of proving the imprisonment on the 12th of *October*. It appeared at the trial, that the action originated out of proceedings originally taken by *Lane* alone in the city courts, and some of the defendants had no connexion whatever with the imprisonment of the plaintiff till the 12th of *October*, and every thing prior to the 12th of *October* was abandoned at the trial.

PARKE, B.—The taxation may be referred back to the Master for the purpose of inquiring what costs are proper, considering the case with reference to the fact, that the only acts of trespass substantiated against the defendants were on the 12th of *October* and subsequent days, and only such costs can be allowed as would have been necessary, if the action had been brought for the trespasses committed on the 12th of *October* and subsequent days. With respect to setting off the costs of the defendants who succeeded, it is clear that we could not give them their costs, and therefore we have no power to order them to be set-off.

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BOLLAND, ALDERSON, and GURNEY, Barons, concurred.

Rule accordingly (a).

(a) The taxation seems also to have been incorrect in allowing the costs of the issues found for the defendants *Lane*, *Barrowcliff*, and *Davies*, on the first three counts, to be deducted from the plaintiff's costs; for the rule as to setting off costs does not apply to paupers. *Butler v. Innes*, 2 Str. 890; *Winter v. Snow*, 3 Wils. 24. But no objection was taken to this.

ROBERTS v. WILLIAMS and Another.

A notice of action given to justices of the peace, under the 24 Geo. 2, c. 44, s. 1, is sufficient, if the attorney gives his place of business as his place of abode, though he resides at another place.

THIS was an action against the defendants, as justices of the peace, for ordering the plaintiff to be imprisoned; and at the trial a notice of action was put in, pursuant to the 24 Geo. 2, c. 44, s. 1, indorsed thus:—"Edward Jones, Record Street, Ruthin, Denbighshire, attorney for the said Robert Roberts." It appeared that the private residence of Mr. Jones was at *Brynhyfrid*, a short distance from *Record Street*, where his office only was. It was thereupon objected that there was not a sufficient description of the place of abode of the attorney. *Bolland, B.*, before whom the cause was tried, reserved the point, and the plaintiff had a verdict. A rule *nisi* to enter a nonsuit was afterwards obtained by *John Jervis*, against which

R. V. Richards and *Dunn* shewed cause.—The object of the act in requiring the place of abode of the attorney to be indorsed, was to give the defendant an opportunity of tendering amends, and to know where to make the tender; and the place of business would seem to be the most proper place to give to the defendant: the act does not say the place of residence, but the place of abode. In *Osborn*

v. Gough (a), a notice signed "*William Spurrier, of Birmingham, in the county of Warwick, attorney, for the within named William Gough,*" was held sufficient. Lord *Alvanley* there said, "that the defendant had had all the protection which the statute was inclined to afford him. If the place indorsed on the notice be the true place of the attorney's abode, it lies on the defendant to show that such description has not afforded him the opportunity of taking advantage of the act of Parliament. In this case, no evidence has been offered to shew that *William Spurrier* could not be found if reasonable diligence had been used." An attorney's office is his place of abode during the day, and would satisfy the words of the act. They also referred to the Uniformity of Process Act, where the same words had always received a similar construction.

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J. Jervis, contra, relied on *Hill v. Humfreys (b)*, and *Taylor v. Fenwick (c)*, where Lord *Mansfield* said, that the legislature having thought fit to prescribe a certain form, it must be strictly followed, and that the attorney ought, in words, upon the face of the notice, to state his place of abode.

Cur. adv. vult.

On a subsequent day in this Term, the judgment of the Court was delivered by

LORD ABINGER, C. B.—The Court have taken some time to consider the objection made in this case, which is one of considerable importance in practice. We find no express decision upon the point; and we were struck with the reason of the thing, and the great inconvenience which would result in practice from holding the construc-

(a) 3 Bos. & P. 551.

(b) 2 Bos. & P. 343.

(c) 3 Bos. & P. 553, note (a).

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tion of the act to be as is contended for by the defendants. Under the Uniformity of Process Act, where the same expression is used, it appears that the practice has uniformly been to state the place of business, and that that practice is supported by several decisions. We think, therefore, that reason and convenience compel us to hold, that the place where an attorney abides for the purposes of his business, is a correct description to satisfy this act of Parliament, and that this notice was therefore sufficient. The Court are inclined to think, however, that either will do; the place of residence, or the place of business. One argument urged at the bar was this, that where several persons in partnership are carrying on their business at some one specified place, but all residing in different places, very great inconvenience would ensue, if it were necessary that the notice must specify all those places of residence, and the defendant were thus obliged to go to several different places to tender amends. After some doubt, therefore, we have come to the conclusion, that the place of business is a sufficient place of the attorney's abode, within the meaning of the act. The rule for entering a nonsuit will therefore be discharged.

Rule discharged.

COUSINS v. PADDON.

In an action for goods sold and delivered, or work and labour, the defendant is at

liberty, under the plea of *nunquam indebitatus, non assumptus* to shew that the goods were not made in a workmanlike manner, or were not such as were contracted for.

If a plea states a payment, or a set-off to a certain amount, but the whole is not proved, the defendant cannot have a verdict on the whole plea, although the sum is alleged under a *videlicet*; but the plea may be taken distributively, and found partly for the defendant, and partly for the plaintiff.

A defendant pleading payment and a set-off, who is unable to prove the full amount mentioned in each of the pleas, but proves sufficient to form an aggregate equal to the plaintiff's demand, will be entitled to have judgment on the whole record.

DEBT.—The declaration contained a count for goods sold and delivered; for work and labour done; and on an account stated. The defendant pleaded—*first*, never

indebted; and, *secondly*, as to certain parcel of said sum above demanded, to wit, 338*l.*, defendant says, that plaintiff ought not to have his action against him to recover any damages, by reason of the non-payment of same, because, that after same became due, and before the commencement of this suit, defendant paid plaintiff a certain sum, to wit, 338*l.*, in full satisfaction and discharge of certain parcel of sum above demanded, to wit, 338*l.*, and of damages by reason of the detaining thereof by defendant, as in the declaration is mentioned; which said sum of 338*l.*, by defendant paid as aforesaid, plaintiff then accepted and received from defendant in full satisfaction and discharge, &c.

Thirdly, As to said sum of 500*l.*, parcel of said sum above demanded, defendant says, that plaintiff ought not to have his action against him to recover any damages, by reason of non-payment of same, because plaintiff, before and at the time of the commencement of said suit, was indebted to defendant in 500*l.* for money lent, and for money paid, and for money due and owing upon an account stated, which equals the sum of 500*l.* demanded by plaintiff, &c. *Replication*.—That defendant did not pay plaintiff said 338*l.* in discharge of said sums above demanded &c. And thereupon issue is joined. And that plaintiff is not indebted to defendant in manner and form as defendant &c. And thereupon issue is joined.

The cause was tried before Mr. Justice *Patteson*, at the *Winchester* Spring Assizes, 1835. By the evidence on the part of the plaintiff, it appeared, that the action was brought to recover the amount of certain bricks made by him for the defendant. There was a specific contract between the parties, the terms of which were, that the plaintiff should supply "good, sound, saleable bricks, at the rate of 24*s.* per thousand." On the part of the defendant, it was proposed to adduce evidence, for the purpose of shewing that the full value of the bricks had been paid

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to the plaintiff with the exception of a certain sum, and as to that, a set-off of money paid to the plaintiff's use. If the bricks had been delivered pursuant to the contract, the value, calculated according to the price agreed on in the contract, would have been 396*l.* 12*s.* It was shewn, that after the bricks were delivered, the defendant had retained them a short time on his premises without offering to return them, and had also disposed of some of them. On the part of the plaintiff, it was contended, that at common law the defendant could not give evidence of the inferiority of the bricks having regard to the contract, and that if he could, the new pleading rules precluded him from giving it in evidence under the plea of *nunquam indebteditatus*. In the opinion of Mr. Justice Patteson, however, it was competent for the defendant to go into such a defence. Evidence was then given, that the bricks were of a quality inferior to those contemplated by the contract; that payments to the extent of 314*l.* 3*s.* had been made on account; and of a set-off for money paid to the extent of 21*l.* The plaintiff contended, that, as the plea of payment mentioned a sum of 338*l.*, he was bound to prove to the full extent that amount. The defendant then applied to amend the plea by altering the sum mentioned in it to the sum proved. It, however, not appearing clear to the learned Judge that he had power to make such an amendment, he directed the facts to be specially found pursuant to the 3 & 4 *Will.* 4, c. 42, s. 24. He directed the jury to consider, whether the total amount proved by the defendant as payment and set-off, namely 335*l.* 3*s.*, was a sufficient payment for the bricks delivered. The jury found that it was. A verdict was then entered for the plaintiff—damages one shilling; the learned Judge giving leave to the defendant to move to enter a verdict for himself on the second issue. A rule *nisi* having been obtained to that effect, a cross-rule was also obtained on the part of the plaintiff for increasing the damages from one shilling to 61*l.* 9*s.*, the difference between the sum

proved by the defendant and the contract price. Both rules came on to be argued in *Trinity Term*.

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Earl and Crowder appeared for the plaintiff.—They contended that, on the issue raised by the first plea, the defendant could not give evidence of the bad quality of the bricks.

PARKE, B.—The law on this subject I understand to have been settled ever since the case of *Basten v. Butler*, (a). It is part of the implied contract that the work shall be done in a workmanlike manner. If it is not, the plaintiff can only proceed on a *quantum meruit*. In the case of *Poulton v. Lattimore* (b) the plaintiff was no more than the seller. Where the plaintiff himself is the workman he enters into an implied contract to do the work in a workmanlike manner.

Erle and Crowder.—If the defendant wished to avail himself of the objection that the work was not properly done, he should have taken advantage of it by plea. The principal object of the new rule was, that, when the parties came down to trial, they might know precisely what issue they were to try.

PARKE, B.—The case would have been different if the plaintiff had declared upon a special contract. In that case the defendant, by pleading *nunquam indebitatus*, would only have been entitled to deny the contract in fact. Here, however, the plaintiff has declared on an implied contract, and therefore the defendant may deny by this plea that part of the implied contract stated in the declaration, that those goods which were delivered were those for which the defendant contracted.

(a) 7 East. 479.

(b) 9 B. & C. 259; 4 M. & R. 208.

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Erle and Crowder.—Next as to the pleas of payment, and set-off—*first*, as to the plea of payment; that admitted a cause of action to the amount of 338*l.* Evidence was given only to the extent of 314*l.* In consequence of this, the sum of 24*l.* must remain due to the plaintiff. Had the defendant only pleaded that plea, the plaintiff must have been entitled to a verdict; for issue was joined with respect to the payment of that specific sum. The same observation applied to the plea of set-off. Part payments might be considered by the jury for the purpose of reducing the damages, but these sums had been pleaded in bar of the action. Finally, there was no power to amend, by direction of the learned Judge, because the statutes only applied to variances between the allegation and proof. The circumstance of the sum being laid under a *videlicet* made no difference; for the amount to which the plea was to apply must be stated with precision.

Dampier and Smirke were heard for the defendant, and cited the following cases:—*Edmunds v. Harris* (a), *Taylor v. Hilary* (b), *Alexander v. Gardner* (c), *Paramore v. Johnson* (d), *M'Quillin v. Cox* (e), *Lord v. Hans-toun* (f), and *Redford v. Birley* (g).

PARKE, B.—The only point on which we wish to take time for consideration is on the effect of the two pleas of payment and set-off, especially the former; *first*, whether they can be taken distributively; or, if not, whether, upon the facts found by the jury, we can say that the variance was immaterial, and might have been amended. On the other point, the Court all concur. The old law certainly allowed the defendant to avail himself, on the general issue, in such a case as this, of the defence that the work

(a) 2 Ad. & Ell. 414; 4 Nev. 281; 3 Dowl. P. C. 146. & M. 182.

(d) 1 Ld. Raym. 566.

(b) Ante, Vol. 3, p. 461; 2 C. M. & R. 743. S. C.

(e) 1 H. Bl. 249.

(f) 11 East, 62.

(c) 1 Bing. N. C. 671; 1 Scott,

(g) 3 Stark. N. P. C. 83.

was improperly done, or the goods delivered not such as were contracted for. We think the late rules have made no alteration in this respect. The defendant is entitled, under the plea of *non assumpsit*, or *nunquam indebitatus*, to a declaration for the price of goods, to shew either that there was no sale or delivery, or none such as to make him liable on the contract: so also, in an action for work and labour and materials, he has a right to shew that the work done, or materials provided, were not such as to render him liable to pay for them under the contract. He then shews his liability to pay on a contract of another description, that is, a *quantum meruit*. The rule to increase the damages will therefore be discharged. On the rule for entering a verdict for the defendant, we will take time to consider.

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Cur. adv. vult.

PARKE, B., delivered the judgment of the Court in the present term.—The question remaining for consideration is, whether the defendant is entitled to a verdict upon the issue on the second plea altogether, or as to the 31*l.* 3*s.*, part of the sum therein mentioned, the verdict as to the residue being found for the plaintiff. It appears to us that the defendant is not entitled to a verdict on the whole plea. The plea contains an admission that a certain parcel of the debt was due; and in order to support the whole plea, that parcel must be proved to have been paid; and that parcel is by the introductory part of the plea stated to be 33*l.* It is true, it is so stated under a *videlicet*; but it is perfectly clear that the addition of a *videlicet* cannot render a material averment immaterial; *Greenwood v. Barnett* (a); and there is no doubt that the sum mentioned in the plea is material, for the plea must state how much of the demand it proposes to answer. On a demurrer to this plea for not stating that part with cer-

(a) 6 T. R. 460.

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tainty, the answer would have been that it was so stated, and that the *videlicet* made no difference. For this reason we are of opinion that the defendant cannot have a verdict on the whole plea, but we think that the plea may be taken distributively, and found as to part for the defendant, and part for the plaintiff. The general rule is, that a plea is an entire thing, and bad altogether if disproved in part; but to this rule there are exceptions which have been long established. For instance, in a plea of *plene administravit*, though assets unadministered are shewn to be in the defendant's hands, and so the plea is disproved, yet the judgment for the plaintiff is only for the part unadministered (a). So on a plea of judgment recovered against the testator in actions against an executor, and no assets *ultra*, it is not enough to disprove a single judgment. So, where two executors join in a plea of *plene administravit*, and assets are proved to be in the hands of one only. All these are instances where, from the nature of the case, the plea is not entire; and the question is, whether the present case falls within the same principle. If this had been an action of *indebitatus assumpsit*, there could, we think, have been no doubt that the plea would have been divisible. A plea of payment is not usual in *assumpsit*; but pleas of set-off and the statute of limitations, which are very common, are, we believe, almost invariably pleaded to the whole declaration; and yet, if the debts due to the defendant do not cover the whole demand, or the whole of the causes of action did not accrue beyond six years, and the residue in both cases is answered under the general issue, the defendant has always judgment on the whole record. So, if there be a plea of the general issue, and a plea of bankruptcy to the whole declaration, and part of the demand be answered on the general issue, and part by the defendant's certificate,

(a) 1 Saund. 336.

the case is the same. This can only be on the ground that such pleas to a declaration of this general nature, which may and often does comprise many distinct contracts in point of fact, are capable of being severed, and applied to each portion of the demand, in a like manner as if there were several distinct pleas, one to each of such portions respectively. For if, in the cases above stated, the pleas of set-off, of the statute of limitations, and of bankruptcy, were entire, and if disproved in part, were bad altogether, then, as they are each pleaded to the whole declaration, and are proved only as to part of it, the consequence would be, that the plaintiff would be entitled to a verdict upon the issues on each of those pleas. It seldom happened, before the late rules, that there was any occasion in these cases to make any other entry on the record than a general finding for the defendant, and judgment for the defendant on both issues; but since the costs of each issue now follow the event of the issue, there can be no doubt that the proper entry would be in such cases on the general issue for the defendant as to all but —L, (the sum covered by the proof under the special plea), and on the special plea, so far as related to that sum, for the defendant; and as to the residue on both issues, for the plaintiff. If this be so, there is no reason why, upon a special plea of payment, the same course should not be pursued. Such a plea does not mean that the defendant paid one certain fixed sum at a certain time, but that he did, either in one sum, or in several sums at different times, pay the whole of the plaintiff's demand. When the plea is so understood, there is nothing contradictory in holding that the issue might be found as to part for the plaintiff, and part for the defendant. The remaining question then is, whether there is any difference between these cases and similar pleas to an action of debt on simple contract. While it was considered to be law, that an action of debt on a special contract was founded on

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one entire single contract, and that the plaintiff could not recover less than the whole, doubtless a special plea of payment was also entire; and if the full amount was not proved to be paid, the plaintiff was entitled to a verdict; but since it has been established by several cases that the demand in such actions is divisible, and the plaintiff may recover less, and since several contracts may certainly be included in a demand of one sum in an action of debt on simple contract, as well as *indebitatus assumpsit*, and since a plea of payment, whether pleaded to a declaration in one form of action or the other, must have the same meaning, and does not of necessity import that one entire sum was paid at one time, we do not see any satisfactory reason why it may not be considered capable of being severed in one case as well as the other, whether pleaded to the whole declaration, or, as in the present case, to part. The only difference between the two actions will therefore be, that in an action of *assumpsit* the plea to the whole declaration admits no certain sum to have been originally due from the defendant to the plaintiff, while the plea to the whole declaration in debt admits the sum nominally claimed to have been originally due. In either, we think the verdict may be found for the defendant for the whole, or for the part actually paid, according to the fact. This decision will be productive of great practical convenience, as, under the new rules of pleading, payment must be pleaded specially; and unless the plea be divisible, the defendant must either multiply his pleas by pleading to each of the demands separately, or he must be driven to the necessity of applying to amend on the trial under the 3 & 4 Will. 4, c. 42, in case any part of the plea should be proved. The verdict must be entered on the plea of payment, so far as relates to the sum of \$144. 3s., for the defendant; on the plea of set-off, so far as relates to the sum of \$11., for the defendant; and on the plea of *numquam indebitatus*, as to the whole sum demanded, except

335*l.* 3*s.*, for the defendant. The consequence will be, that on the whole record the defendant will have judgment.

Rule absolute accordingly.

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PAPLIEF v. CODRINGTON.

THE defendant was arrested in this action on the 6th of *July*, for 100*l.*, upon a bill of exchange, alleged to have been accepted by the defendant; on the 13th the plaintiff declared, by the declaration it appeared that the bill was dated *October 28*, 1831. The defendant, who was an officer in the army, was obliged about this time to leave with his regiment for *India*, but he informed his attorney before he left that he knew nothing of the plaintiff, and that the bill must have been fraudulently obtained from him. An application was made to the plaintiff's attorney for an inspection of the bill, but this was refused. A summons was also taken out to ascertain the place of residence of the plaintiff, and upon applying at the place pointed out, it was found that the house was only occupied by some one who had the care of it. The time for pleading being nearly expired, the defendant's attorney pleaded a plea of "no consideration" to the count on the bill of exchange, and upon a summons having been taken out for an inspection of the bill, Mr. Baron *Alderson* refused to make an order, on the ground that the plea of no consideration did not require it. The plaintiff demurred to the plea, and early in this term a rule *nisi* was moved for by *Sewell*, for leave to withdraw the former plea and plead *de novo*, and also for an inspection, which the Court, with some difficulty, granted, observing, that the defendant ought to have applied for an inspection before he pleaded, and not have thrown the plaintiff over the long vacation, and the rule was only granted on the terms of allowing the venue to be changed, taking short notice of trial, and un-

After a bad plea of "no consideration" to a declaration on a bill of exchange, by which the plaintiff has been delayed the long vacation, the Court will, under special circumstances, allow the defendant to withdraw his plea and plead *de novo* and have an inspection of the bill without an affidavit of merits.

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dertaking to plead non-acceptance, and any other plea the Court might allow.

Platt and Humfrey shewed cause.—They objected to the motion, on the ground that there was no affidavit of merits, and cited *Stoughton v. Earl of Kilmorey* (a), where a plea similar to the present was pleaded, and the Court refused to allow an amendment except on an affidavit of merits. The plaintiff, if a good plea had been pleaded, could have gone to trial at the last Summer Assizes, but a bad plea was pleaded of no consideration, for which no inspection was necessary, and the learned Judge was therefore right in refusing an inspection. If the bill was fraudulently obtained, that might have been pleaded.

Sir *W. W. Follett*, and *Sewell*, in support of the rule.—This is an application to the equitable interference of the Court, under special circumstances. The address given of the plaintiff was found to be false, and the plea was pleaded for the purpose of getting time to make inquiries, the defendant being sworn to be abroad.

The Court said, that, under the special circumstances, the rule ought to be absolute, without an affidavit of merits.

Rule absolute, on payment of costs.

(a) Ante, Vol. 3, p. 706.

TURLEY's Bail.

UPON these bail coming up to justify—

In the *Eschequer*, bail justifying by affidavit, having been before rejected, must make a deposit for costs.

J. Jervis claimed a deposit for costs, the bail having

An affidavit to oppose bail, on the ground that they have been before rejected, must shew that they were rejected for insufficiency.

been before rejected; and he referred to *Smith v. Cooper's Assignees* (a).

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Archbold, in support of the bail.—The rule does not apply to bail by affidavit. The rule in the *King's Bench* (b) speaks of bail who “*appear* to justify,” which evidently only applies to bail in person, as was held in *Henderson v. Dorling* (c). Here the bail are country bail, who justify by affidavit.

GURNEY, B., (after consulting the Master), decided that the deposit must be made, and that the rule applied to country bail as well as to town bail.

The deposit having been made—

J. Jervis then produced an affidavit that one of the bail had been before rejected by Lord *Denman*, C. J., at chambers, but the affidavit did not state that he had been rejected for insufficiency.

The Court overruled this objection.

The bail afterwards justified.

(a) 1 C. & J. 460.

(c) MS. 1824, Archb. Prac.

(b) Hil. 1822, cited *Archbold*, 171, note (b); *Tennell v. Gardner*,
170. Ib.

MEREDITH v. STOCKER.

BARSTOW moved to make absolute a rule for judgment as in case of a nonsuit.—It appeared by the affida-

The issue cannot be looked at on a motion for judgment, as in case of a

nonsuit, unless it is referred to in the affidavit.

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vit that the action was on a bill of exchange by the defendant as acceptor: but it did not appear in the affidavit that issue was joined.—*Barstow* contended that he was at liberty to refer to the issue; that under the old practice the rule was always drawn up on reading the issue, but by the rule of *H. T. & Will. 4, s. 70*, no entry of the issue is necessary to entitle a defendant to move for judgment as in case of a nonsuit: this rule was made for the purpose of saving costs, and though the practice was altered, the principle was not, and therefore the issue might be looked at as formerly.

F. V. Lee, contra.—The defendant has no right to look at the issue, unless it is brought before the Court by affidavit; under the old practice the affidavit referred to the issue, but it is not so here. In *Preedy v. Macfarlane* (a), it was held that the *præcipe* could not be referred to unless it was verified by affidavit.

PARKE, B.—The affidavit should have referred to the issue, or the plea should have been stated in the affidavit.

ALDERSON, B.—I am of the same opinion.

LORD ABINGER, and BOLLAND, B., concurred.

Rule discharged.

(a) 1 C. M. & R. 819; 5 Tyrw. 356.

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SOAMES v. RAWLINGS.

KELLY applied for a prohibition to be directed to the Commissioners of the *Westminster* Court of Requests, appointed under 23 *Geo. 2*, c. 27, explained by 24 *Geo. 2*, c. 42. From the affidavits (a) it appeared that the names of the plaintiff and defendant were both on the list of voters for *Westminster*, and that the defendant had given notice to the overseer of an objection to the plaintiff's name being retained on the list, in pursuance of the 2 *Will. 4*, c. 45, s. 47. An objection was accordingly entered against the plaintiff's name, and he not appearing at the proper time before the revising barrister, his name was struck out. Afterwards the plaintiff did attend before the revising barrister, and waited there three days, and then sent in a bill to the defendant for three days' expenses and loss of time, incurred by the notice given by the defendant; and at length the plaintiff summoned the defendant to the *Westminster* Court of Requests, and the Commissioners awarded him compensation. It was now contended that the Commissioners had no jurisdiction in the matter. The words of the 23 *Geo. 2*, c. 27, s. 5, which gives the Court of Requests jurisdiction in certain cases, are these: "It shall be lawful to and for every resident and inhabitant within the said city and liberty, or the said part of the said duchy aforesaid, and to and for all and every person and persons renting and keeping any shop, &c., or seeking a livelihood within the said city and liberty of *Westminster*, or in the said part of the said duchy aforesaid, who now have, or hereafter shall have, any *debt* or *debts* due or owing unto him, her, or them, not amounting to the sum of forty shillings, by any person or persons whatsoever inhabiting or seeking

An unfounded objection to a voter's name in the list, pursuant to the 2 *Will. 4*, c. 45, s. 47, by which he is prejudiced, having to attend the revising barrister, does not give such a legal or equitable claim for compensation for loss of time, &c., as will enable him to sue under the *Westminster* Court of Requests Act; and therefore, if the Commissioners under it proceed on the claim, they may be restrained by prohibition.

(a) See 1 *Will. 4*, c. 21, s. 1, which allows a prohibition to be moved for on affidavits.

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a livelihood within the said city and liberty of *Westminster*, or in that part of the said duchy aforesaid, to apply to the said clerks of the said Court, or one of them, who shall cause such *debtor* or *debtors* so inhabiting or seeking a livelihood as aforesaid, to be warned or summoned by the said high bailiff, or his officer or officers, (who are hereby appointed, authorized, and required to execute all warrants, precepts, and process of the said Court of Requests), by writing left at the dwelling-house or place of abode, shop, shed, stall, stand, or any other place of dealing of such *debtor* or *debtors*, to appear before the Commissioners of the said Court, to be held in and for such division where such debtor or debtors shall inhabit or reside as aforesaid, and that the said Commissioners, or any three or more of them, shall, after the return of such summons as aforesaid, have full power and authority by virtue of this act to make, or cause to be made, such acts, order or orders, *decrees*, judgments, and proceedings, between such party or parties, plaintiffs, and his, her, or their debtor or debtors, defendants, touching such debts not amounting to the sum of forty shillings, *as they shall find to stand with equity and good conscience.*" The title of the act is, "An Act for the easy Recovery of Small Debts," &c.; and the 8th section provides, that if a debt recoverable in the Court of Requests is sued for in any other Court, the act may be pleaded. It appears clearly, therefore, that the act is confined to debts, strictly so called; and in *Jonns v. Greening* (a), which was upon the *London* Court of Requests Acts, where the words are very similar, it was held, that in the 3 *Jac.* 1, c. 15; 14 *Geo.* 2, c. 10; 39 & 40 *Geo.* 3, c. civ., the word "debts" did not comprehend an unliquidated demand for the breach of an agreement. Here, the only mode of suing the defendant, if any action at all

(a) 5 T. R. 529.

would lie, would be by a special action on the case, for this was clearly a claim for unliquidated damages.

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ALDERSON, B.—It must have been alleged that the notice was given “maliciously.”

PARKE, B.—And without reasonable or probable cause.

A rule *nisi* having been granted,

On a subsequent day two of the Commissioners appeared in person to shew cause (a). They urged that the Reform Act only gave authority to object to bad votes; and they said that it was proved there was no pretence for any objection to the plaintiff’s vote, but that the defendant had wantonly caused a very great number of notices of objection to be served without any apparent reason: that, as they considered the proceeding on the part of the defendant to be entirely unauthorized, the plaintiff had a right to look to him for a remuneration for his loss of time, &c., occasioned by the defendant’s wrongful act; and they contended, upon the construction of the act, that it gave them a legal as well as an equitable jurisdiction, which they said they had been always in the habit of exercising without objection.

Kelly, in support of the rule, was stopped by the Court.

LORD ABINGER, C. B.—The demand against the defendant is clearly not a debt. The Court of Requests Act applies only to debts, and the Commissioners have as to them a legal and equitable power.

(a) It appeared that they had the Court would only allow them not taken office copies of the affidavits in support of the rule; and to proceed on their undertaking to procure office copies.

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PARKE, B.—The first clause, which enables the Commissioners to make such decree as to them shall seem just in law and equity, is confined to the cases after mentioned, which are specified in section 5 to mean “debts;” and when a case of debt comes before the Commissioners, they can decide upon it equally between man and man in an equitable way, but it must be what is called a legal debt. If any action at all would lie, it would be a special action on the case, for wilfully, and without probable cause, occasioning expense to the plaintiff by an unfounded objection.

ALDERSON, B.—I think the language of the act clearly shews that the jurisdiction of the Commissioners is intended to be confined to debts strictly so called.

GURNEY, B., concurred.

Rule absolute.

POTTER v. NEWMAN.

Applications to set aside awards made under a Judge's order of reference are now put on the same footing as to time as if the awards were made under the 8 & 9 Will. 3; but if the party affected has not notice of the award sufficiently early to enable him to move within the time allowed by the act, he may move to set it aside in the term next after the notice.

CHANNELL moved to set aside an award.—By an order of *Bosanquet, J.*, dated *March 21, 1835*, this cause and all matters in difference were referred to two arbitrators, or such umpire as they should appoint, before proceeding in the reference; such umpire, when appointed, to

A reference was made to two arbitrators, and an umpire to be chosen by them, who was to be present and decide each reference as it might arise, and either might make an award. The umpire, in the presence of the arbitrators, disallowed the plaintiff part of his claim, which made the balance in favour of the defendant; and afterwards, without notice to the arbitrator or defendant, made his award in favour of the plaintiff. The Court set aside the award.

Whether the 3 & 4 Will. 4, c. 42, s. 39, applies to all arbitrations, so as to enable a Judge to make an order for enlarging the time beyond what the parties had agreed upon, and without any clause to that effect in the submission, or only to cases where one party has improperly attempted to revoke the arbitrator's authority—*Query?*

be present and decide each matter as it might arise, so that the arbitrators, or umpire, made their or his award on or before the 15th of *April* then next ensuing. Power was also given to examine the parties themselves on oath, and to compel the production of all books, &c., and the costs were to abide the event. The award, dated *May* 19th, 1835, after reciting the order of reference, and that the two arbitrators had appointed *Thomas Wise* (who alone made the award) to act with them in the reference before they proceeded upon it, and that the time limited for making the award or umpirage had been duly enlarged until the 20th day of *May*, ordered the defendant to pay to the plaintiff, on the 19th of *June*, at the office of Messrs. *Freeman & Benson*, 13*l.* 6*s.* 1*d.*, which he found to be due and owing from the defendant to the plaintiff on a settlement of all accounts, dealings, and transactions between them. From the affidavits of one of the arbitrators and the defendant, it appeared that the particulars of the plaintiff's demand amounted to 550*l.* 11*s.* 1*d.*, and the particulars of the defendant's set-off, to 519*l.* 5*s.* $\frac{1}{2}$ *d.*; that the arbitrators and umpire having met, the accounts were examined, and the whole of the defendant's set-off proved, admitted, and allowed by the umpire; that in the particulars of the plaintiff's demand there was a sum of 50*l.* 17*s.* 6*d.* claimed to be due to him for fifty quarters of oats, delivered at various times to the defendant; that this was the principal subject of contention between the parties; and, after the plaintiff's evidence on this item had been gone through, the umpire disallowed the claim, and signed a memorandum in writing of such disallowance as follows:—"Fifty quarters of oats, &c., *February* 15, not proved, and struck out by me.—*Thomas Wise*, referee." That, by other deductions from the plaintiff's claim, it was reduced by a sum of between 70*l.* and 80*l.*; that no other discussion, either of the 50*l.* 17*s.* 6*d.* or of the defendant's set-off, took place before that

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arbitrator, or the defendant, or had that arbitrator or the defendant any notice of a meeting for that purpose. That the arbitrator signed a request for enlarging the time without the knowledge of the defendant or his attorney. That a copy of the award was delivered at the defendant's house on the 17th or 18th of *June*, which was the first notice that the defendant had of the award. The rule was moved for on two grounds—*first*, that, as by the terms of the reference the evidence ought to have been examined in the presence of both the arbitrators, and as it appeared by the affidavit of one of them that the balance was clearly in favour of the defendant, the umpire must either have again gone into the case in the absence of that arbitrator, or else have made a clear mistake; *secondly*, that the award was made too late, the time being limited to the 15th of *April*. The Court granted a rule *nisi* (a).

Humfrey shewed cause.—*First*, the motion is out of time. The reference was under a Judge's order; and it is sworn that the award was made and published on the 19th of *May*, two days before *Trinity* Term, which commenced on the 22nd of *May*. The money was to be paid on the 19th of *June*, and was then demanded and refused. This motion was not made till the present term; it ought to have been made in the term next after the award was made.

Channell, *contra*, contended, that the defendant not having had notice of the award till the 17th or 18th of *June*, he could not make the motion in *Trinity* Term.

PARKE, B.—The statute of 8 & 9 *Will.* 3 (b) is obliga-

(a) *Humfrey*, on the same day, had on behalf of the plaintiff obtained an attachment for non-performance of the award by the defendant; but the rule for the

attachment was ordered to be suspended, till the other rule was disposed of.

(b) c. 15, s. 2.

tory upon the parties to move in the term next after the award, and though the act does not apply to references under a Judge's order, yet the practice in both instances having been assimilated, the defendant would be bound to move within the time allowed by the act: but as it appears that the defendant had no notice of the award till after *Trinity Term*, I think the motion is in time.

The Court overruled this objection.

Hunfrey.—The rule was moved for on two grounds—*first*, that the umpire has unduly or improperly allowed to the plaintiff a sum of money, after it had been agreed that it should be disallowed, or else that he has disallowed the defendant a part of his set-off, after the whole had been allowed and proved; *secondly*, that the time was not duly enlarged. With respect to the second point, it appears by an affidavit that the time was duly enlarged by a Judge's order, dated the 14th of *April*, to the 20th of *May*, at the written request of the arbitrators and umpire. A question has been raised whether, as the terms of submission gave no power to the arbitrators or umpire to enlarge the time, the learned Judge had power to make the order. The order was made under the 3 & 4 *Will.* 4, c. 42, s. 39 (a), the object of which is declared generally to

(a) By this clause, which recites that it is expedient to render references to arbitration more effectual, it is enacted that the power and authority of any arbitrator or umpire, appointed by or in pursuance of any rule of Court, or Judge's order, or order of *Nisi Prius*, in any action now brought, or which shall be hereafter brought, or by or in pursuance of any submission to reference containing an agreement that such submis-

sion shall be made a rule of any of his Majesty's Courts of record, shall not be revocable by any party to such reference without the leave of the Court by which such rule or order shall be made, or which shall be mentioned in such submission, or by leave of a Judge; and the arbitrator or umpire shall and may, and is hereby required, to proceed with the reference, notwithstanding any such revocation, and to make

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be "to make references to arbitration more effectual:" the first part of the clause takes away the power to revoke in every case, and applies to every arbitrator; the last clause gives power to the Court or a Judge to extend the time for every such arbitrator to make his award.

Channell contended that the section only applied to cases where there has been a revocation, which might be done at the last moment, so as to prevent the arbitrator from making his award in time.

LORD ABINGER, C. B.—It does not appear to me that the latter part of the section applies at all, unless you can strike out an intermediate passage.

ALDERSON, B.—The question is, whether the Court is not put in the place of the revoked arbitrator? This section gives the Court a power to enlarge from time to time where the arbitrator's power is gone by a revocation; but it would alter the contract of the parties if the Court might enlarge the time in every case.

PARKE, B.—The latter part of the clause is limited by the word "*such*." If you strike out the passage giving power to an arbitrator where there has been a revocation to proceed with the reference, the word "*such*" would clearly apply to "every arbitrator" mentioned in the first part of the section. It is a good rule to go by in construing acts of Parliament, to give to the words a grammatical construction: here the words are general—"any arbitrator," and the subsequent words "*such* arbitrator," ought

such award, although the person making such revocation shall not afterwards attend the reference; and that the Court, or any Judge

thereof, may, from time to time, enlarge the term for any *such* arbitrator making his award.

not, according to my present impression, to be confined to an arbitrator in the predicament mentioned in another part of the clause. But as upon the other point it appears that the umpire has made a clear mistake as to 50*l.*, it is unnecessary to decide upon the construction of that section.

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ALDERSON, B.—It was agreed that the accounts should be examined, and decided item by item; and the umpire, after awarding as to 50*l.* in favour of one party, gives it to the other.

The *Court* recommended that there should be a reference to a professional arbitrator, which was agreed to; and the rule was ordered to be made absolute, unless the plaintiff consented to refer the matters in difference to a gentleman at the bar, who was to be at liberty to use the notes of the former arbitrators and umpire; each party to bear his own costs of the second reference.

Rule absolute accordingly.

SPYER v. THELWELL.

ASSUMPSIT.—The declaration stated, that whereas one *Phineas Nathan*, on the 10th day of *February*, A. D. 1833, made his bill of exchange in writing, and directed

In an action by the indorsee against the acceptor of a bill of exchange, the declaration alleged that one

P. N. drew the bill, and required the defendant to pay to his order, &c., and that the defendant accepted the bill, and *P. N.* indorsed it to the plaintiff. On special demurrer, alleging that "his" was ambiguous, &c.:—*Held*, that "his" need not necessarily be referred to the last antecedent, and that it sufficiently appeared that it had reference to the drawer, and the count was therefore sufficient.

A second count alleged that the defendant, on a particular day, was indebted to the plaintiff in 300*l.*, "for money found to be due on an account stated between them:"—*Held*, bad on special demurrer, for not stating when the account was stated.

The defendant demurred to the declaration, and then stated the causes of demurrer to each count:—*Held*, that as the demurrer was to the whole declaration, it was too large, because one count was good, and that the plaintiff was therefore entitled to judgment on the whole declaration, though one count was bad on special demurrer.

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the same to the defendant, and thereby required the defendant to pay to *his* order 127*l.* 7*s.* 6*d.* for value received, five months after the date thereof, which period has now elapsed; and the defendant then accepted the said bill, and the said *P. N.* then indorsed the same to the plaintiff; of all which the defendant then had due notice, and then promised the plaintiff to pay him the amount of the said bill, according to the tenor and effect thereof, and of the said acceptance and indorsement; and whereas the defendant, on the 17th day of *July*, A. D. 1835, was indebted to the plaintiff in 300*l.*, for money found to be due from the defendant to the plaintiff on an account stated between them; and the defendant afterwards, to wit, on the day and year last aforesaid, in consideration of the last-mentioned premises, then promised the plaintiff to pay him the said last-mentioned money on request; yet the defendant hath disregarded his promises, and hath not paid either of the said monies or any part thereof; to the plaintiff's damage of 300*l.* And thereupon he brings suit, &c.

Demurrer.—The defendant, by *J. J. A.*, his attorney, says that the declaration is not sufficient in law, and the defendant shews the following causes of demurrer, that is to say, for that the count on the bill of exchange is either ambiguous, in not shewing with sufficient certainty to whose order the money was to be paid, the word "*his*," as there used, being ambiguous; or else the word "*his*" refers to the last antecedent, namely the defendant, in which case an indorsement by the defendant himself ought to have been averred; and for that the count on the account stated is informal in not stating any time when the account was stated; and that the time when the account was stated ought to have been stated with certainty; and that at least the word "*then*" ought to have been inserted in the declaration before the word "*stated*;" and

that the declaration is in other respects uncertain, informal, and insufficient, &c.

Joinder in demurrer.

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Addison, in support of the demurrer.—The objection to the first count is, that the word “his” is ambiguous, for it is doubtful whether it is referrible to the acceptor or the drawer; and the declaration is entitled to no indulgence, as it has unnecessarily deviated from the forms given by the recent rules (a). “His” refers to the last antecedent, unless the sense necessarily requires a different construction, which here it does not, for a man may draw a bill upon himself, as was decided in *Stark v. Cheesman* (b); there is therefore no necessity to give any other construction than the grammatical one. It was necessary to demur on account of the ambiguity, for that is the proper and only mode of taking advantage of the objection. That was decided by the Court of *Common Pleas*, in *Walford v. Anthony and Others* (c), which was an action of trespass against three defendants, and the declaration charged that they broke and entered a close of the plaintiff, abutting on a close of the *said defendants*; and at the trial it appeared that the close abutted on the close of one of the defendants only, not being the defendant whose name was mentioned last before the word “said,” and the plaintiff was nonsuited; but the Court set it aside, on the ground that it was only an ambiguity, and proper ground of a special demurrer. Here issue could not have been safely taken on the making of the bill, though if a bill could not be drawn payable to the acceptor’s order it would be different, but it can; and this is more important, because it was held in *Shuttleworth v. Stevens* (d), confirmed by *Edis v. Berry* (e), that where an instrument is ambiguously drawn out of the

(a) T. T. 1 Will. 4.

(d) 1 Campb. 407.

(b) Carth. 509.

(e) 6 B. & C. 433; 9 D. & R.

(c) 8 Bing. 75; 1 M. & Scott, 492; 2 C. & P. 559, S. C.
126, S. C.

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usual form, it may in general be treated as a bill or note, at the option of the holder. The objection, that no time is given when the account was stated, has been already held to be a good objection, in *Fergusson v. Mitchell* (a). *The King v. Holland* (b) is an express authority in favour of the objection.

PARKE, B.—There is no doubt that here there are two counts; (in *Fergusson v. Mitchell* (c) there was a doubt about it, and we did not decide upon it); and therefore, if either of the counts is good, the plaintiff is entitled to a judgment generally, because the demurrer is too large.

Addison submitted that a demurrer to several counts was a separate demurrer to each.

PARKE, B.—This demurrer is to the whole declaration, consisting of two counts. The causes of demurrer are to the whole declaration, and if either count is good, the plaintiff is entitled to judgment on the whole declaration, and I am of opinion that the first count is good. The question is, whether the word “his” is referrible to the defendant or the plaintiff? *Prima facie* it is referrible to the last antecedent “defendant;” but we must put such a construction upon words as is conformable to common sense, and that shews that “his” means the “plaintiff’s own” order.

BOLLAND, ALDERSON, and GURNEY, Barons, concurred.

Tremenhere was to have supported the declaration.

Judgment for the plaintiff (d).

(a) Post, p. 513.

(b) 5 T. R. 625.

(c) Post, p. 513.

(d) See *Fergusson v. Mitchell*, post, p. 513.

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FERGUSSON and Another, Assignees, &c., v. MITCHELL.

DEBT.—The declaration was as follows:—*John Fergusson and J. P.*, assignees of the estate and effects of *J. W. Bromley*, an insolvent debtor, in pursuance of an act of Parliament made at *Westminster* in the seventh year of the reign of his late Majesty King *George* the Fourth, to amend and consolidate the laws for the relief of insolvent debtors in *England*, and of an act of Parliament made at *Westminster* in the first year of the reign of our lord the now King, to continue and amend the laws for the relief of insolvent debtors in *England*, by *F. E.*, their attorney, complain of *Wm. Mitchell*, who has been summoned to answer the said *J. F.* and *J. P.*, [by virtue of a writ issued on Wednesday, the 8th day of July, A.D. 1835, out of the Court of our lord the King, before the Barons of his Exchequer at *Westminster*] (a). For that whereas the defendant, on the 1st day of July, A. D. 1835, was indebted to the said

In debt, by assignees of an insolvent debtor, the declaration in its commencement stated that the plaintiffs, assignees of *J. W. B.*, an insolvent debtor, &c., complain of *W. M.*, who has been summoned to answer the plaintiffs, assignees as aforesaid, in an action of debt; and they demand of the said *W. M.* 40*l.*, which he owes to and unjustly detains from them, &c. The defendant demurred, specially alleging for cause that

the plaintiffs did not shew whether they were suing as assignees or as individuals, and that they ought not to have declared in the *debet* and *detinet*. In making up the demurrer books for the Judges, the plaintiff's attorney had adopted the form of issue directed by the rules of *Hilary Term 4 Will. 4*, and therefore the objectionable part did not appear:—*Held, first*, that the issue was properly made up, and therefore the defendant was precluded from taking the objection; and, *secondly*, that the objectionable part, being a mere recital of the writ, might be rejected as surplusage.

The declaration alleged that the defendant, &c., was indebted to said *J. W. B.* before he subscribed his petition for his discharge from imprisonment, and executed the conveyance and assignment of his estate and effects according to the provisions of the said acts, in the sum of 20*l.*, for goods sold and delivered by the said *J. W. B.* before he became insolvent, to the said defendant at his request, and in 20*l.* for money found to be due from the defendant to the said *J. W. B.* on an account stated between them, which said several monies were to be paid respectively by the defendant to *J. W. B.* before he became insolvent, on request, whereby, &c., an action hath accrued to the plaintiffs as assignees, &c., to demand and have the said several monies respectively, &c. A special demurrer assigned for cause that no certain time was alleged when the goods were sold, nor when the account was stated:—*Held*, that the former objection could not be sustained, but that the latter was a good objection; but as the demurrer was to the declaration, which was sufficient as to one of the causes of action, though not as to the other, the demurrer was too large, and that the plaintiff was entitled to judgment generally on the whole declaration.

(a) This was the form in which the demurrer books were made up and delivered to the Judges. The declaration as delivered, instead of the words in italics, had the following: "assignees as aforesaid

said in an action of debt, and they demand of the said William Mitchell the sum of 40*l.* which he owes to and unjustly detains from them, &c."

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J. W. B. before he subscribed his petition for his discharge from imprisonment, and executed the conveyance and assignment of his estate and effects, according to the provisions of the said acts, in the sum of 20*l.*, for goods sold and delivered by the said *J. W. B.* before he became insolvent, to the said defendant, at his request, and in 20*l.* for money found to be due from the said defendant to the said *J. W. B.* on an account stated between them, which said several monies were to be paid respectively by the defendant to the said *J. W. B.* before he became insolvent, on request; whereby, and by reason of the nonpayment thereof, and of the same still remaining unpaid, an action hath accrued to the plaintiffs as assignees as aforesaid, to demand and have of and from the defendant the said several monies respectively, amounting to the sum of 40*l.*, above demanded; yet the defendant hath not paid the said sum above demanded, or any part thereof, to the damage of the plaintiffs, as assignees as aforesaid, of 10*l.*; and thereupon they bring suit, &c.

Demurrer.—The defendant says, that the declaration is not sufficient in law, for that it does not thereby sufficiently appear in what capacity or character the plaintiffs sue the defendant; and also for that, although the plaintiffs therein state themselves to be the assignees of the estate and effects of one *J. W. B.*, an insolvent debtor, yet they do not sue the defendant as such assignees; and also for that the declaration states that the defendant was summoned to answer the plaintiffs in their individual character, and not in the character of such assignees; and also for that although the plaintiffs in the declaration state themselves to be such assignees, and sue the defendant for a debt alleged to be due to the said insolvent, they nevertheless therein complain that the defendant owes the same debt to them, the plaintiffs; and also for that the plaintiffs, although they state therein that the defendant is indebted to another party in a certain sum, nevertheless demand the

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same debt as due to themselves; and also for that the plaintiffs therein claim a debt growing out of a contract to which they were not parties; and also for that it is not stated in the first count of the declaration that the goods therein alleged to have been sold and delivered by the said *J. W. B.* to the said defendant, were so sold or delivered previously to the time of subscribing or on filing the petition for the discharge from imprisonment of the said *J. W. B.*, or on executing the conveyance and assignment of his estate and effects, according to the provisions of the said first-mentioned act; and also for that it does not distinctly appear that the said debt in the said first count claimed was due or growing due at the time of filing such petition of the said *J. W. B.*, according to the exigency of the said first-mentioned act; and also for that it does not by the said first count appear but that the said goods were sold and delivered by the said *J. W. B.* to the defendant after such conveyance and assignment; and also that it does not by the said first count appear at what time the said goods were sold and delivered by the said *J. W. B.* to the defendant; and also for that it does not appear but that the account in the second count of the declaration alleged to have been stated was stated after such conveyance and assignment; and also for that no time is mentioned or set forth when the said alleged account was stated; and also for that it does not clearly appear between what parties such alleged account was stated; and also for that it does not appear that the said several monies in the declaration mentioned were to be paid by the defendant to the said *J. W. B.*, or that the defendant was liable to pay the same before he, the said *J. W. B.*, subscribed his said petition, or before he filed the same, or before the execution of said conveyance and assignment; and also for that it is not stated in the declaration that the defendant has not paid the said several monies therein demanded to the said *J. W. B.* before he subscribed his said petition; and also for that the declaration is in other respects insufficient, &c.

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Arnold, in support of the demurrer.—The first objection is, that it does not sufficiently appear in what character the plaintiffs call on the defendant; this ought to appear, and unless it is expressly stated that they sue as assignees, it must be taken that they sue in their own right. In *Brigden v. Parkes* (a), it was held that counts, laying the promises to have been made by a testator in his lifetime, were improperly joined with counts laying the promises to have been made by the defendants executors as aforesaid, because it did not appear that the promises were made by them as executors. So in *Henshall v. Roberts* (b), it was held that a count upon an account stated with the plaintiff 'executrix as aforesaid,' not saying 'as' executrix, could not be joined with a count on a promise to the testator.

PARKE, B.—The objection only applies to the commencement of the declaration, for the cause of action is alleged to accrue to them as assignees, and in the commencement they allege that they are assignees of the insolvent. The word "being" has been held to constitute a sufficient averment.

Arnold.—The description given to the plaintiffs in the way in which it is stated, does not shew that they are suing as assignees. *Cobbett v. Cochrane* (c) is distinguishable from the present case. The second objection

(a) 2 B. & P. 424.

(b) 5 East, 150.

(c) 1 M. & Scott, 55; 8 Bing. 17, S. C. This was a demurrer to a declaration in assumpsit. The plaintiffs declared "as assignees," and concluded the declaration thus: "wherefore the said plaintiffs, assignees as aforesaid, say that

they are injured, and have sustained damage to the value of 100*l.*, and therefore they bring their suit, &c." There was a special demurrer, assigning that it did not appear that the plaintiffs had sustained any damage as assignees. The Court held that the words "assignees as aforesaid"

is, that the plaintiffs have improperly declared in the *debet* and *detinet*. *Fitzherbert's N. B.* (a) is an authority to shew that executors cannot sue in that form; and assignees stand in the same situation.

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[It was here discovered that the demurrer books delivered to the Judges did not contain that part of the commencement of the declaration to which this objection applied; and upon a supposition that the demurrer books had been improperly made up by the attorney, the argument was ordered to stand over, that inquiries might be made.]

Platt, on a subsequent day, appeared to support the declaration.—He contended, that the issue had been properly made up, according to the form No. 1 of the rules of *Hilary Term 4 Will. 4*; the form of an issue in fact and in law being now made up in the same way. He cited *Chapman's Practice* (b), where the form given of an issue upon demurrer is the same as that of an issue of fact; it would, therefore, have been improper in the attorney to insert those words in the issue which the Court had expressly directed should be left out.

Arnold contended, that that form only applied to issues in fact; here, the demurrer was to the commencement of the declaration, and therefore the issue, ought to be amended, by inserting the words which have been improperly left

might be rejected as surplusage. See also *Biddell v. Dowse and Others*, executors, 3 Bing. 30, where the want of the word "as" to the promise alleged to be made by the defendants, was held to be immaterial, where, upon the whole declaration, it appeared that the defendants were sued as execu-

tors, and were only intended to be charged as executors. The same objection was urged afterwards in error, (see *Biddell v. Dowse*, 6 B. & C. 261; 9 D. & R. 404), but the case was disposed of on another ground.

(a) 119, fol. b. m.

(b) P.44.

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out; and he relied upon *Fitzherbert's N.B.*, that, if the commencement of the declaration was improperly framed, it was a material objection.

PARKE, B.—I am of opinion that this amendment cannot be made; for the issue, as drawn, is according to the exact words of the form of issue given by the new rules; neither do I think that if the words were inserted the objection made would be of any consequence. The recital of the writ in the commencement of a declaration in debt was held by the Court of *King's Bench*, in *Lord v. Houston* (a), to be surplusage, and that the words “of a plea that the defendant render, &c.,” might be rejected as surplusage; and that was decided upon special demurrer. Looking also at the forms of the commencement of declarations given by the rules of *Michaelmas Term 3 Will. 4*, drawn up by Lord *Tenterden*, under the 18th section of the Uniformity of Process Act (b), it appears that they were not intended to require any recital of the writ. I think that the decision of the Court of *King's Bench* was correct and sensible.

ALDERSON, B.—I am of the same opinion.

Arnold.—Another ground of demurrer is, that the time when the goods were sold and delivered is not stated with sufficient certainty; no precise meaning can be given to the words “before he became insolvent.” The meaning of the word “insolvency” was discussed in the recent case of *Parker v. Gossage* (c), where this Court expressed an opinion, that, though “bankruptcy” in its ordinary sense would imply a bankruptcy according to law, yet that insolvency in its ordinary sense meant the inability to meet

(a) 11 East, 62.

conclude with an “&c.”

(b) 2 Will. 4, c. 39. The forms

(c) 2 C. M. & R. 617.

the demands of creditors; but supposing the term "insolvent" to have a technical as well as a natural meaning, there is nothing to shew which was meant here. The plaintiff's title as assignee commences only from the assignment. The provisions in the Insolvent Act, 7 Geo. 4, c. 57, as to the right of the assignees to the insolvent's property, and their power to sue, will be found in sections 11, 16, 19, 20, 24, and 40. A man is adjudicated a bankrupt, but it is not so with an insolvent. The same objection as to the uncertainty of time applies to the count on the account stated; no time at all is given as to when the account was stated, nor between whom. *Higgins v. Highfield* (a) is an authority upon this point: that was an action of trespass, and no time was stated when the defendant broke the plaintiff's close; it was also alleged that the plaintiff was ejected for a long space of time, without specifying how long. Lord *Ellenborough* said, that the declaration would have been clearly bad on special demurrer; but after judgment by default, the defects were aided by the statutes of jeofails. *Denison v. Richardson* (b) is another authority on this point: it was there held, that in a material averment the word "then" was an insufficient statement of time, because, if taken by itself it specified no particular time, and if taken with reference to the day before stated in the count, and thereby made the account senseless and repugnant, it was bad on special demurrer. In the form given by the rules of *Trinity Term 1 Will. 4* for an account stated, the words are "on an account then and there stated between them;" and though a late rule (c) has directed that no *venue* shall be inserted in transitory actions, the necessity of an allegation of time is untouched. Here the objection is particularly pointed out as a ground of demurrer, and must therefore prevail.

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(a) 13 East, 407.

(b) 14 East, 291.

(c) H. T. 4 W. 4, s. 8; ante, Vol. 2,
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Platt, in support of the declaration.—The 19th section of the Insolvent Act gives the assignee a right to sue for debts, by relation to the time of the provisional assignment. The Court will assume that every thing has been done which was necessary to give the assignee a complete right of action; and though he may not have been appointed till some time after the petition of the insolvent, yet, as his title relates back, the debt must have been due previously to the assignment. The filing the petition and assignment are to be contemporaneous acts, and therefore the allegation is sufficiently certain. As to the account stated, time is specified in the averment of the debt, and the time when the account was stated, out of which the debt arose, is not material, as it must have taken place previously. At all events, the plaintiff is entitled to judgment on the first count, as, upon the 74th rule of *Hilary Term 2 Will. 4*, it has been held, that a distinct issue is raised on every debt stated in a common count (a).

PARKE, B.—Is it one count, or are there several? There is a difficulty about it; and as there is some doubt, the Court recommend an amendment, without costs on either side.

ALDERSON, B.—It is a doubtful question whether they are one or several counts. The 74th rule is only as to costs.

[This offer being rejected, the Court gave judgment].

PARKE, B.—The first point, as to the amendment, has been disposed of, and also another objection, as to the statement of the plaintiff's title in the commencement of the declaration. As to the objection, that the time when

(a) See *Cox v. Thomason*, ante, Vol. 1, p. 572.

the goods are stated to have been sold *is ambiguous*, I think that the expression "before he became insolvent," is equivalent to "before that time," which would have been sufficient. If he could have become insolvent after subscribing his petition, there would have been an ambiguity; but if the insolvency relates to the subscribing the petition, there is none. As to the other point, upon the form of the account stated count, I think that there is no sufficient allegation of time; it deviates from all the precedents; and as the want of time is specially pointed out, I think the objection is a good one. Upon the question, whether the count is to be regarded as one or several, if the plaintiff had gone to trial he might have recovered for the goods, and not on the account stated, and therefore I am inclined to think, that they are several counts, and the judgment of the Court will be accordingly, without determining whether it is one or several (a).

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(a) It is a little singular that this question should not have been yet determined, though the forms called "common counts," given by the rules of T. T. 1 Will. 4, have been now in constant use for several years. There was a case of *Garrett v. Drummond*, in which the question came before Lord Tenterden at chambers, almost immediately after those forms came into use. The declaration was in *assumpsit*, and contained, first, a special count, with a promise and breach complete in itself; and then followed what are called in the rule "common counts," with the general conclusion, exactly in the form given by the rule. To the first count there was a special demurrer, and to the *last* count the plea of the general issue.

The plaintiff thereupon signed judgment on the counts, (which he assumed were unanswered) between the first and last, and as to the first and last he entered a *nolle prosequi*. A summons was taken out on behalf of the defendant to set aside that judgment, and it was attended by the attorneys on both sides, before Lord Tenterden, at chambers; and it was urged that the pleas were drawn by a pleader, and that the general issue was pleaded to the *last* count, upon the supposition that, according to the technical rules of pleading, it was in point of form only one count: his Lordship, however, held that the judgment was regular, and dismissed the summons. The sum in dispute was so small that the

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BOLLAND B.—Upon the face of the petition and schedule the prisoner is admitted to be an insolvent debtor,

defendant preferred paying it to the risk of incurring further expense by an application to the Court. Before these forms were ordered to be adopted, a similar form had been constantly in use in actions by or against executors, assignees, &c., where several sets of counts were frequently introduced; and, for shortness, a concise form was adopted, almost precisely similar to that given by the rule of T. T. 1 Will. 4, (see the form in 2 Chitty on Pleading, 4th ed., pp. 89 and 99; also 1 Chit. Pl. 301), and which was always treated as one count; but it differs from the "common counts" in not having the word "respectively" introduced, and by virtue of which word in the new forms, the promise is to be looked upon as several, and making as many counts as there are debts or considerations previously mentioned; and the form also has the word "*promises*." The rule of T. T. 1 Will. 4 did not make it obligatory upon plaintiffs to adopt these forms, it only provided that they should pay the excess of costs occasioned by the extra length; neither was any form given in *debt*, though a similar concise form was directed to be used on pain of costs. Those rules could not have the effect of altering the principles of pleading, nor had the Judges then the power of altering the law by declaring that what was really only one count should be several; and

it seems difficult to understand how there can be several distinct and complete counts where there is only one promise stated. The recent rules of H. T. 4 Will. 4 did not clear up the doubt, for by one of them it is directed that where there are several debts alleged in *indebitatus assumpsit*, with one promise (which is precisely the "common counts"), the statement of each debt is to be *considered as amounting to a several count, within the rule which forbids the use of several counts, &c.* This rule would have been wholly unnecessary if before they really were "several" counts: and if it be said that the rule was given for greater caution, the peculiar language used seems not to warrant that suggestion. As this rule, however, has the power of an act of Parliament, it may be considered as altering the rule of pleading as applicable to every count where only one promise is annexed to several debts, though there is no such word as "respectively" or "severally" used. With respect to the form of the declaration, in the principal case of *Ferguson v. Mitchell*, it is conceived, that if the introduction of the word "respectively" in the "common counts" in *assumpsit* makes the promise several in respect of each of the debts to which the promise applies, the same argument would apply to this declaration in *debt*, to shew that it comprises two counts.

and he is treated by the Court as an insolvent debtor. The meaning of the expression "insolvent" in the count is—a man who has applied to the Insolvent Court. On the other points I agree with my Brother *Parke*.

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ALDERSON, B., concurred.

GURNEY, B.—The 10th section of the Insolvent Act directs that a prisoner applying to be discharged shall petition the Court in the way there pointed out, and shall subscribe such petition, which is to be filed. The 11th section makes it incumbent on the prisoner, at the time of subscribing his petition, to execute a conveyance and assignment of all his effects to a provisional assignee; and the 19th section directs that an assignee of the estate shall be appointed, to whom the provisional assignee is to assign all the right he had under the provisional assignment; it also enacts that the estate of the insolvent shall be then vested in the assignee by relation, as if the first assignment had been made at once to him. The term "insolvency," therefore, relates to the time of signing the petition; and the indenture of assignment, which is to accompany the signing of the petition, describes the prisoner as an insolvent debtor. I think, therefore, there is no ambiguity in the expression "insolvent." Upon the other points I agree with the rest of the Court.

Subsequently, *Parke*, B., said, that he had looked into the cases of *Powdick v. Lyon* (a), and *Amory v.*

(See the cases of *Spyer v. Thelwell*, ante, p. 509, and *Jourdain v. Johnson*, post, p. 534.)

(a) 11 East, 565. This was an action of scire facias, and the declaration demanded execution for a certain sum recovered by judgment of B. R. for damages and

costs, with a prout patet per recordum, and also a certain other sum adjudged to him in the Exchequer Chamber, for his damages and costs of a writ of error, without a prout patet, &c.:—Held, that the demand being divisible, and no objection lying to the sum

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Broderick (a); and that, as the demurrer was one entire demurrer to the whole declaration, and part of the declaration was good, the demurrer could not be supported; and that the Court were of opinion that the judgment should be entered generally for the plaintiff, and that the defendant was not entitled to judgment on any part of the declaration.

Judgment for the plaintiff *(b)*.

first demanded, a demurrer to the whole declaration was bad, and that the plaintiff was entitled to judgment generally on such demurrer; the objection to the latter sum demanded being merely formal, and not available but on special demurrer.

(a) 1 D. & R. 361; 5 B. & Ald. 712. And see *Wyatt v. Harrison*, 3 B. & Adol. 871; and *Campbell v. Lewis*, 3 B. & Ald. 392; 1 Wils. 284.

(b) The question which arose in this case as to the consequence of a demurrer being too large, is one of frequent occurrence, and generally comes by surprise upon counsel; and as the decisions upon the point do not appear to be easily reconcileable with one another, it may be useful to bring them together in one view. An early case, and which may be considered to be a leading one, will be found in 2 Saunders's Reports, p. 379, *Pinkney* against *The Inhabitants of the East Hundred of Rutland*. It was an action on the statute of Hue and Cry, and the declaration alleged that the plaintiff had been robbed of goods and money. The defendant demurred to the whole

declaration. It was admitted by Saunders, for the plaintiff, that the declaration was insufficient quoad the goods, because they were not specified particularly, and because they were not averred to be the goods of the plaintiff; but as the declaration was clearly good quoad the money stolen, it was contended that the plaintiff ought to have judgment for the part which was well laid, and be barred for the residue, because it was said the claim was divisible; and an instance was put of an action of covenant where several breaches are assigned, some being good and others bad, and where, if the defendant demurred to the whole declaration, the plaintiff should have judgment for those breaches which were well assigned, and shall be barred for the residue; and the whole Court, it is said, were of this opinion, without any difficulty, and judgment was entered for the plaintiff for the money, and he entered a remittit damna for the goods. A case cited in the margin of *Bressey v. Humphreys*, Cro. Jac. 557. gives the instance quoted by counsel of a declaration in covenant with

See Sanders v. Hawley
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several breaches, and the demurrer was *to the whole declaration*; and it was urged for the plaintiff that, as the defendant had demurred to the whole declaration, the plaintiff was at all events entitled to judgment *for such of the breaches as were well assigned*, and the Court were of that opinion, *because they were as several actions*. All the breaches, however, were held to be well laid, and therefore the opinion of the Court upon the other point was not necessary. Another case referred to is *Woody's case*, Cro. Jac. 104, which was debt on the statute of usury, and the declaration alleged that the defendant corruptly lent 40*l.*, &c., against the form of the statute; and that on another day he lent 20*l.*, &c., but did not say "corruptly." On *nil debet* pleaded, it was found for the plaintiff, and on motion in arrest of judgment it was contended that the plaintiff was not entitled to judgment for any part; but the Court said, that, as the declaration was good for part, the plaintiff should have judgment for that part; for, as it was for several sums, it was in the nature of two several actions: and it was held, that if the defendant had demurred *to the declaration* it would have been good as to one of the sums, and the plaintiff should have had judgment *for that part*; and so in debt against an executor upon an obligation of the testator's and upon a simple contract, it would be good for the obligation. In *Ingledeu v. Cripps*, 2 Lord Raym. 814; S. C. 7 Mod. 87; Salk. 658; Holt, 200,

which was debt on a penal bill, the declaration demanded the price of a certain number of hundreds of stacks of wood, and also of part of a hundred, the covenant only binding the defendant to pay so much for every hundred delivered; and it being admitted upon demurrer *to the declaration* that the plaintiff had demanded too much, it was contended for the defendant that the plaintiff was not entitled to recover anything; but in order to avoid the question, an application was made for leave to remit, which was granted, after argument, on the ground that the demand was divisible; and judgment was given for the plaintiff *for what was due*, with leave to enter a remittit for the residue. It does not appear on what terms that leave was given. In these cases the question seems to have been, not whether, because the demurrer was too large, the plaintiff was entitled to judgment on the whole declaration or only on a part, but whether he was entitled to judgment for a part or for nothing. In *Godfrey's case*, 11 Co. 45 a, there was a demurrer to an avowry; (which is looked upon as a declaration); and the objection made only applying to part of the avowry, the question was argued, whether the defendant was entitled to judgment for part, or whether the whole was bad. Lord Coke lays down the true rule to be this—"That where a man brings an action, be the writ general, or certain and particular, and he demands two

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things, and it appears of his own shewing that he cannot have an action or better writ for one of them, there the writ shall not abate for the whole, but shall stand for that which is good: but when a man brings an action for two things, and it appears that he cannot have this writ for one thing, but may have another in another form, there the writ shall abate for all, and shall not stand for that which is good." In *Barber v. Pomeroy*, Style, 175, the declaration in debt demanded seven years' arrears of rent, and seven capons; and after verdict and judgment for the plaintiff, it was moved in arrest of judgment that the plaintiff had demanded too much, and the question was, whether he might relinquish part and have judgment for the rest; and the majority of the Judges held, that he might remit; but Jerman, J., held, that he could not; and he said, that on demurrer the judgment would have been against the plaintiff: the other Judges, it is presumed, would (if it had been on demurrer) have given the plaintiff judgment for the good part, and allowed him to remit for the residue, as was done in *Ingledew v. Cripps*. And Mr. Serjeant Williams, in note (4) to *Dupps v. Mayo*, 1 Saund. 285, has laid down the following rule:—Where the sum demanded depends upon a deed or other instrument, and on nothing *extrinsic*, as in debt or covenant to pay 20*l.*, there can be no *remittitur*, for the variance which is made is inconsistent with the deed or other instrument

upon which the duty demanded depends; otherwise, where it may be more or less by matter extrinsic; as, in debt for rent, if more be demanded than is due, it may be remitted, for the variance is not *inconsistent with the deed*; and as the plaintiff is to recover on the trial what appears on evidence to be due, so on demurrer he is to have judgment for no more than he ought to recover, and may remit the rest; and cites 2 Salk. 659, *Ingledew v. Cripps*; S. C. 7 Mod. 87; 2 Lord Raym. 814.

These cases, and others cited in them, seem to shew, that where there is a demurrer to the whole of a declaration or breach, which is not divisible in its nature, the whole declaration or breach is bad; if it is divisible, then the plaintiff is entitled to judgment for so much of the declaration or breach as is good, and no more: they are perhaps not very easy to be reconciled with some late cases, which shall be noticed; but there is one class of cases which, though they seem to be in opposition to the previous authorities, are not so in reality. Such is the case of *Judin v. Samuel*, 1 Bos. & P. New Rep. 43, the marginal abstract of which would lead to the supposition that where there is a demurrer to the whole declaration, and any one count is good, judgment must be for the plaintiff on the whole declaration. That was an action on the case, with special counts, and a count in trover; there was a general demurrer for misjoinder, upon the supposition that some of

the counts were really in assumpsit: but the Court held, that all the counts were framed in case, and that non assumpsit could not be pleaded to any of them, and therefore the demurrer could not be maintained; though they added, that if there had been a special demurrer to one or more of the counts, it might have been sustained. *Hensworth v. Fowkes*, 1 Nev. & M. 321; 4 B. & Adol. 449, S. C., was a similar case. The demurrer there was general to a declaration consisting of several counts for misjoinder, some parts of the counts being alleged to be trespass, and the rest in case: the Court were of opinion that the whole declaration was in case, and the judgment was therefore generally for the plaintiff, though Patteson, J., said, that if there had been a special demurrer to the part of the count objected to, it might have been maintained. These cases, and many others to the same point, shew, that though each count may be individually good, yet if they are misjoined, there may be a general demurrer; for misjoinder is a good objection even in arrest of judgment. *Corbett v. Packington*, 9 D. & R. 258; 6 B. & C. 268. So if several breaches are misjoined in covenant, the demurrer must be to the whole declaration or count. *Kingdom v. Nottle*, 1 M. & Selw. 360. The Duke of Bedford *v. Alcock*, 1 Wils. 248, was a case of general demurrer to a declaration for misjoinder in debt of counts on amercements in court-leets, with a count on a

mutuatus: the case was twice argued, principally on the validity of the customs as set forth in the special counts. Lee, C. J., in giving judgment, is reported to have said, that, as the mutuatus count was good in itself, and might be joined with the others, it was unnecessary to consider whether the other counts were good or bad: but his judgment seems to have proceeded on the ground that all the counts were good on general demurrer, and that they might be joined, and the plaintiff was therefore entitled to judgment. *Powell v. Graham*, 7 Taunt. 580; 1 Moore, 580, S. C., was also a case of demurrer to a declaration for misjoinder; there was a special assignment of misjoinder as a cause of demurrer. Best, Serjt., in argument, contended, that, if either of the counts was good, there being no misjoinder, the plaintiff was entitled to judgment *on the good count*; for which he cited *Judin v. Samuel*, 1 N. R. 43, and *Powdick v. Lyon*, 11 East, 565. And Gibbs, C. J., says, if one count is bad, the plaintiff is entitled to judgment *on all the other counts*; but Gibbs, C. J., and Parke, J., being of opinion that all the counts were good, the plaintiff had judgment generally. Burrough, J., was of opinion that the eighth count was bad, and that therefore the plaintiff ought only to have judgment *upon the other counts*.

We will now notice the cases in which it is said to have been held, that, where the demurrer is too large, the plaintiff is entitled

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to judgment generally. *Powdick v. Lyon*, 11 East, 565, was an action of scire facias, and in the declaration the plaintiff claimed to have a judgment executed for 316*l.* 10*s.* damages, and 13*l.* 10*s.* costs. There was a special demurrer to the declaration, assigning for cause that no recovery on record was shewn for the 13*l.* 10*s.* and no reference to any record. A doubt was suggested by Lord Ellenborough as to the demurrer being too large, as no objection was suggested to the claim of 316*l.* 10*s.* *Barnes*, for the defendant, referred to *Pinkney v. The Inhabitants of Rutland*, contending that the plaintiff was not entitled to recover any thing; though he admitted, upon the authority of that case, that the plaintiff in a proper case might recover for part, and be barred for the residue, which he urged did not apply to this case. Bayley, J., said, that the demand was divisible, and that, as the plaintiff's claim was good for part, the demurrer to the whole declaration was *bad*; and he added, that the objection was only formal, and that the plaintiff was entitled substantially to the whole of his demand. Lord Ellenborough also held, that the demurrer was too large, and *therefore bad*; and that judgment must therefore be for the plaintiff *generally*, and that the Court could not give judgment that the *demurrer* was in part good. This seems to be the first case in which the Court are said to have held that the *demurrer* was bad or informal, and therefore fell to the ground like a plea bad in part.

No authority was cited, and such an objection does not appear to have suggested itself to the counsel for the defendant, who only argued the point as to the declaration being bad in part or for the whole. Neither is the judgment ever for part of a demurrer, as Lord Ellenborough is made to say, because the judgment always is, that the previous pleading is sufficient in law, &c., and, as appears by the cases previously cited, may be for part or the whole; and if there had been two separate demurrers to different parts of the declaration, and one demurrer was maintainable and the other not, then it seems to be admitted that on one the judgment must have been for the defendant; and therefore the question seems to resolve itself into the *form* of the demurrer; and yet it has been held that there can be no demurrer to a demurrer for informality or otherwise. *Campbell v. St. John*, 1 Salk. 219. Neither has it been usual in practice to plead several demurrers where every count in a declaration is objected to as bad, nor where there are two or more counts demurrable; one demurrer is pleaded to all. It is to be observed, that the demurrer specially pointed out the objection; and it is said in a note by the reporter, that the demurrer being *informal*, it was as if the special cause was not assigned; but no authority is cited, and the stat. 4 Anne, c. 16, referred to, does not warrant that suggestion, for, before that act, no difference was made between substantial and formal defects; but

that statute put formal objections specially assigned on the same footing as substantial objections on a general demurrer. *Amory v. Broderick*, 1 D. & R. 361; 5 B. & Ald. 712, was a special demurrer to a breach assigned in a declaration in covenant, and the cause assigned was, "that the plaintiff sought to recover damages which he was not entitled by law to recover," without shewing what damages in particular were objected to. The Court, upon the argument, were of opinion that the breach assigned was perfectly good, and that the plaintiff was also entitled to recover the principal part of the damages alleged to have accrued by the breach of covenant; and they therefore held, that there was no cause of demurrer to the breach, which was perfect in itself; and the Court seemed to intimate that there was no ground of demurrer at all, even if it had been confined to that part of the special damage. We are not aware of any case where a demurrer has been held to lie, merely because, when there is a perfectly good count or breach, the plaintiff has alleged that more damage has accrued to him than in point of fact has accrued: it is a question for the jury at the trial, under the direction of the Judge, what amount of damage has been sustained, and whether damages of a particular description are or are not recoverable; and this seems to have been the opinion of the Court in *Campbell v. Lewis*, 3 B. & Ald. 394, where, upon a writ of error, an objection was sought to be

raised as a ground for reversing the judgment, that part of the special damage laid in the declaration was not a consequence of the breach of covenant alleged; but the Court overruled the objection, and said that it was to be presumed that the Judge directed the jury to confine their attention to that part of the special damage only which was relevant to the covenant broken. *Duffield v. Scott*, 3 T. R. 374, was cited by Bayley, J., in *Amory v. Broderick*, as an instance to shew that it is no ground of demurrer to *the action* (where there is a sufficient count and breach) that part of the *special damage* alleged to have accrued was not recoverable. That was an action on a bond, to which the defendant pleaded performance, and the breach was assigned in the replication: the declaration and the breach assigned were perfectly good, but certain expenses were claimed by the plaintiff, to part of which the defendant objected. The demurrer was *general*. The Court were of opinion that the expenses objected to were recoverable. Lord Kenyon said, that if they were not, that was no objection to *the action*, though the Court would take care that the plaintiff did not take out execution for more than he was entitled to recover. Ashhurst, J., said, that the defendant ought not to have demurred, because the only objection to the plaintiff's recovering the expenses was, that the defendant had not had notice, which should have been replied; and it was admitted by the defend-

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dant's counsel, that, in one state of circumstances, even though the defendant had not had notice, he would have been liable for them; which shewed that the demurrer was not sustainable, as well because there was no ground at all for it, as because it was general. Neither is this case in point, where the demurrer is to the *declaration*, because there the demurrer was to the *replication*; and the very ground of the argument of the defendant's counsel was, that a replication which is bad in part, is bad in toto; (that rule certainly does not apply to a declaration); but Buller, J., admitting the rule to be as stated, said, that it was misapplied there, because the part objected to was mere *surplusage*. The replication appears to have been put upon the same footing as the declaration, being in fact merely a continuation of it. Buller, J., added, that if the replication demanded three things, (as was contended by the defendant's counsel), then, if he was entitled to any one, he must have judgment; but it is not said for what. Upon the whole case it was shewn that the plaintiff was entitled to judgment generally. The last two cases, therefore, were instances of special damage not properly laid, in which it is almost doubtful whether any demurrer at all would lie. The Court purposely abstained from saying whether it would or not. In *Smith v. Thomas*, 2 Bing. N. S. 378, it was contended, that there was no objection to the plea denying the existence of special damage. But Tindal,

C. J., said, "the plea must be an answer to the *action*—there is no such thing as a plea to damages. *Powdick v. Lyon* may also be looked upon as a case by itself, and was very like a demurrer for a mislaid special damage; for the *scire facias* was only to have execution of a judgment, which was admitted on both sides to exist; and if the plaintiff claimed to have execution for damages or costs, which were not matter of record, and which the plaintiff could not have recovered, it was mere *surplusage*; and the plaintiff was at all events entitled to his execution; the judgment being that the plaintiff shall have execution for the debt and damages, according to the force, form, and effect of the *said recovery*."

The question may be illustrated by reference to the consequences of a writ of error. Before the statute of Anne, if one of several counts was bad even in form, the entire judgment would have been bad. In *Desborough v. Kelly*, 1 Lord Raymond, 533, error was brought on a judgment in *assumpsit*, where there were several counts in the declaration, because the account stated count wanted the words 'then and there,' and the judgment was reversed. In *Grant v. Astle*, Douglas, 730, Lord Mansfield lamented that the rule should exist, that where there are several counts, entire damages, and one count is bad and the others not, the bad count should affect the whole. The cases on this point will be found collected in 10 Co. p. 131 a; note (a) *Osborne's case*.

See also 1 Saund. 286 (8), and cases there cited; where it is said, that, if the avowant takes judgment for the whole rent, when a title to part only is shewn, it is error. The 27 Eliz. c. 5, s. 1, enacts, that, after demurrer joined, the Court shall give judgment according to the very right of the cause, without regarding any defects, &c., *except* such as are particularly set down and expressed together with the demurrer; and that no judgment shall be reversed by writ of error for defects of form, *except such only as is before excepted.*" The language of the 4 & 5 Anne, c. 16, s. 1, is substantially the same as that of Elizabeth, but more imperative upon the Court not to regard form, where the right sufficiently appears; and the Court are again directed to give judgment without regarding any imperfections, *except* those which are specially set down. These acts, therefore, leave an objection specially set down, of the same force as it was before; and if judgment is signed on a declaration consisting of several counts, with a demurrer upon record particularly specifying an objection to one count, which objection would upon error have been, before these acts, fatal to the whole judgment, a Court of error, it is conceived, must now reverse such judgment.

The rule respecting *pleas* differs from that which applies to declarations, for if a plea be bad in part, it is bad for the whole. *Earl of Manchester v. Vale*, 1 Saund. 28, and note (3); Com. Dig. tit. Pleader, E. 36. And if a plea be pleaded to several counts, but is bad as to one, it is bad for the whole. *Webb v. Martin*, 1 Lev. 48. And where part of the plea is to part of the declaration, and another part of the plea is to another part of the declaration, and upon demurrer to the plea one part is found to be bad, the whole plea is bad. *Ansell v. Smith*, ante, Vol. 3, p. 193. So a joint plea by several, which is bad for one, is bad for all. *Phillips v. Biron*, 1 Str. 509. But a plea of set-off has been looked upon as an exception, and more in the nature of a declaration, and that a general demurrer to a plea of set-off, which was good in part, could not be maintained; but the argument there used, that the different parts of a plea are to be looked upon as several counts of a declaration, to which the Court are said to have assented, does not appear to be correct. The propriety of the decision, however, is recognised in *Cousins v. Paddon*, ante, p. 488.

So an entire *replication* which is bad in part, is bad for the whole.

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Under the plea of not guilty in trespass *quare clausum fregit*, the plaintiff is entitled to full costs, though the damages recovered are less than 40s., and there is no certificate of the Judge, under the 22 & 23 Car. 2, c. 9.

THIS was an action of trespass for breaking and entering a field and digging up potatoes, &c., to which the general issue had been pleaded. The plaintiff obtained a verdict for 13s. only, and the Judge refused to certify. The Master having taxed the plaintiff his full costs, a rule *nisi* was obtained by *Welsby* for reviewing the taxation, and that the plaintiff should be allowed no more costs than damages.

John Jervis shewed cause.—The 22 & 23 Car. 2, c. 9, which enacts that where the damages are under 40s. the plaintiff shall have no more costs than damages, unless the Judge certifies, does not apply to any case where the freehold cannot come in question; and therefore, as, under the new rules the plea of the general issue merely puts in issue the fact of the commission of the trespass in the place alleged in the declaration, the plaintiff is entitled to his full costs, as the Judge has not certified to deprive the plaintiff of them; and though it is true, that that rule will indirectly operate as a repeal of the statute of *Charles*, yet, as the rules themselves have the force of an act of Parliament, the rule is of equal authority with the act.

Welsby, in support of the rule.—The new rules were not intended to repeal the statute of *Charles*; the act is not adverted to in them; and as the decisions upon that statute are admitted to have been a complete deviation from the principle of the act, there is no reason why the doctrine of those cases should be carried further. If the argument on the other side is correct, there is no case in which a defendant can now have the benefit of the statute of *Charles*. The act was directed against vexatious suits, and it appeared at the trial that the defendant had offered

to pay 3*l.* for the damage done, and for which the plaintiff only recovered 13*s.* It is, therefore, clearly the sort of action which the statute was intended to apply to.

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PARKE, B.—The only question is, whether we are to depart from the old authorities, which have given a particular construction to the act, and lay down a new rule in this instance, which would be at variance with the old cases. I am of opinion, that we ought to abide by those decisions. The rule which has been laid down is, that, if the nature of the plea shews distinctly that the freehold could not come in question, the act does not apply. Formerly, upon a plea like the present, as the freehold might have come in question because it could have been given in evidence under it, the statute was held to apply. By the new rules the effect of the general issue has been narrowed, so as to prevent the freehold from coming in question, and therefore the effect of that alteration is to prevent the operation of that act in the present case. It has been contended, that the statute of *Charles* will be deprived of all operation; but upon a plea that the close was not the close of the plaintiff, the freehold might perhaps come in question; and therefore, in that case, the Judge would be at liberty to certify.

ALDERSON, B.—The only difficulty is in the old cases; there is no doubt they were a deviation from the intention of the act. It is said by *Hullock*, B., that, “originally the act did not receive that construction which the language seems to warrant; but we are bound by the weight of authority, and, however we may regret that the true construction of the act seems to have been departed from, we cannot now put that construction upon it which, unfettered by authority, we might be inclined to do (a).” The effect of the new rules is, to prevent the question of

(a) In *Booth v. Ibbotson*, 1 Y. & J. 360.

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freehold from coming in question on the plea of not guilty; and therefore, as the act does not apply, the plaintiff is entitled to his full costs.

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The declaration in *assumpsit* contained—*first*, a count on a bill of exchange by the indorser against the drawer, and then stated various debts, of 100*l.* each, for goods sold, &c., with the common conclusion in the form given by the rule of *Trinity Term 1 Will. 4.* The defendant pleaded, as to the first count of the declaration, and as to 12*l.* 2*s.*, parcel of 100*l.* in the second count claimed to be due for goods sold, and as to 100*l.* in the second count alleged to be due on an account stated, and the promises made by the defendant in respect thereof, payment of 51*l.* 9*s.* 7*d.* into Court, in the form given by the rule of *Hilary Term 4 Will. 4*; and the general issue was pleaded to the residue:—*Held*, that this plea would have been clearly good to the declaration, except to the count on the bill of exchange; but, *quære*, whether it was good for not specifying how much was paid in on the bill:—*Held*, *secondly*, that the plea was bad on special demurrer, for treating the claims for goods, money, &c., as one count; inasmuch as those demands, being stated in the form given by the rule of *Trinity Term 1 Will. 4*, are not only to be considered as separate counts with a view to costs, but also for the purpose of pleading. But, *semble*, that if that form is not strictly followed, and there should be several debts or causes of action stated by way of *indebitatus assumpsit*, with one promise only, and without any words to make the promise several *quoad* each of the debts, such count must be treated as several for the purpose of costs, under the rule of *Hilary Term 4 Will. 4*, though it might not be so for the purpose of pleading.

DECLARATION in *assumpsit* alleged that the defendant, on the 17th day of *February*, 1830, made his bill of exchange in writing, and directed the same to one *John Large*, and thereby required the said *John Large* to pay to the defendant's order 31*l.* 14*s.* 3*d.* for value received five months after the date thereof, which period is now elapsed; and the defendant then and there delivered the said bill to the said *John Large*, and the said *John Large* then and there accepted the said bill; and the said defendant then and there indorsed the same to the plaintiff; and the said *John Large* did not pay the said bill, although the same was duly presented for payment on the day when it became due; of all which the defendant then and there had due notice. And whereas the defendant, on the 1st day of *March*, A. D. 1835, was indebted to the said plaintiff in 100*l.* for money paid by the plaintiff for the use of the defendant, at his request, and in 100*l.* for money then and there lent by the plaintiff to the defendant at his request, and in 100*l.* for the price and value of goods then and there sold and delivered by the plaintiff to the defendant at his request, and in 20*l.* for interest upon and for the forbearance of divers large sums of money before that time and then due and owing from the defendant to the

plaintiff, and by him forborne to the defendant for divers long spaces of time before then elapsed, and at his request; and in 100*l.* for money found to be due from the defendant to the plaintiff on an account then stated between them. Common breach, to the plaintiff's damage of 100*l.*

Plea.—The defendant, by *J. D.*, his attorney, as to the first count of the said declaration, and as to 12*l. 2s.*, parcel of the sum of 100*l.* in the second count of the said declaration alleged to be due from the said defendant to the said plaintiff, for the price and value of goods sold and delivered by the said plaintiff to the said defendant at his request, and as to 100*l.* in the second count of the said declaration alleged to have been found to be due from the said defendant to the said plaintiff on an account stated between them, and the promises alleged by the plaintiff to have been made by the defendant in respect thereof, says, that the plaintiff ought not further to maintain his action in respect thereof, because the defendant now brings into Court the sum of 51*l. 9s. 7d.*, ready to be paid to the plaintiff; and the defendant further says, that the plaintiff has not sustained damages to a greater amount than the said sum of 51*l. 9s. 7d.*, in respect of so much of the causes of action in the declaration mentioned as above specified, and set forth in the introductory part of this plea; and this he is ready to verify: wherefore he prays judgment if the plaintiff ought further to maintain his action in respect thereof. The general issue was pleaded to the *residue*, upon which the plaintiff joined issue (*a*).

(*a*) Though these pleas are treated as several, they are in reality but one plea; and upon a demurrer to the whole, as part was bad, the judgment for the plaintiff would have been general on the whole declaration. See ante, p. 531, for the rule respecting demurrers to pleas; and 1 Chit. Pl. 577, where it is said that the replication should be to the *whole* plea. Query therefore, whether the demurrer in this case was good? because, if a plea being bad in part, is bad for the whole, and therefore cannot be good in part and bad in part, does not the plaintiff, by replying to part, and thereby treating that part as good, also treat the whole as good, and shew that this par-

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Demurrer.—The plaintiff, as to the plea of the defendant by him first above pleaded, says, that the said plea is insufficient in law; and the said plaintiff, according to the form of the statute in such case made and provided, shews to the Court here the following causes of demurrer to the said plea: that is to say, that the said defendant has pleaded payment into Court of 51*l.* 9*s.* 7*d.*, in satisfaction of the sum of 31*l.* 14*s.* 3*d.* specified in the first count of the declaration, and of the sum of 12*l.* 2*s.*, parcel of the sum of 100*l.*, for goods sold and delivered, as stated in the declaration; and of the full sum of 100*l.*, stated in the declaration to be due from the defendant to the plaintiff on an account stated between them; which last-mentioned several sums of money amount to the sum of 143*l.* 16*s.* 3*d.*; whereby the defendant has pleaded the payment into Court of a less sum in satisfaction of a greater. And also that the defendant has not, in his said plea, set forth what portions of the said sum of 51*l.* 9*s.* 7*d.* were intended to be paid on each of the said several causes of action to which the payment of that sum is made applicable, as in that plea mentioned; and that the defendant has not pleaded to each of the 2nd, 3rd, 4th, 5th, and 6th counts of the said declaration separately, as he ought to have done, so that the plaintiff cannot tell how much of each of the said causes of action are put in issue; and the said defendant has pleaded to and stated the 2nd, 3rd, 4th, 5th, and last counts of the said declaration, as if the same

tial demurrer is not sustainable? But see *Parker v. Abfield*, 1 Salk. 311, where an executor having pleaded a plea of several judgments outstanding, to which the plaintiff replied that some of the judgments were kept on foot by fraud, &c., and demurred to the other judgments, the Court held, that if one judgment pleaded was bad, the whole plea was bad;

but it does not appear from the report what was the result. From 1 Saund. 334, note (1), it would appear as if judgment was given generally against the defendant *de bonis testatoris*, and all the judgments, which were well pleaded, set aside. The practice at *Nisi Prius* is, however, different. See the judgment in *Cousins v. Padon*, ante, p. 492.

constituted merely one single count; and the said plea is in other respects uncertain, informal, and insufficient.

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W. H. Watson, in support of the demurrer.—Before the late rule, which gave a form of plea of payment of money into Court, it is quite clear that this plea would have been bad. It was expressly decided in *Fitch v. Sutton* (a), that acceptance of a less sum cannot be a satisfaction in law of a larger sum then due. *Thomas v. Heathorn* (b) is another authority to the same point. The declaration there, which was in *assumpsit*, claimed 1000*l.* for goods sold, &c. ; and there were various other counts, each laying the debt at 1000*l.* The defendant pleaded, that an account had been stated between the bankrupt and the defendant, when the defendant was found to be indebted in the sum of 400*l.*, for which said sum the bankrupt drew a bill upon the defendant, which the latter accepted for and on account of the several promises in the declaration mentioned, by reason whereof the defendant became liable to pay the bill: and it was held, that this plea was bad, inasmuch as it was pleaded to the whole of the demand; and that the giving a bill for 400*l.* was not, in point of law, a satisfaction for the amount of the debt claimed. Before the new rules, when money was paid into Court, it was considered as struck out of the declaration, and the general issue applied only to the residue. The late rule of *Hilary Term 4 Will. 4* (c), directs that, where money is paid into Court, the payment shall be pleaded as near as can be in the form there given, *mutatis mutandis*. The form there given is a plea to the whole cause of action stated in the declaration. Another ground is, that the plea does not distinguish between the second and subsequent counts; the plea only speaks of the second count;

(a) 5 East, 230. (b) 3 D. & R. 647; 2 B. & C. 477. (c) Rule 17.

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and the plea is therefore informal in that respect, which is pointed out as a cause of demurrer.

Hoggins, in support of the plea.—There are but two counts in the declaration, though there are several debts alleged in the second count as the consideration for the promise there stated. There may be several counts for the purposes of costs, within the meaning of the rule of *Hilary Term 4 Will. 4*, but that rule does not say they shall be several counts for all purposes. It is unnecessary, however, to decide that point, because the plea clearly points out to what parts of the plaintiff's demand it applies. The statement, therefore, as to the particular count in which those sums are to be found was unnecessary, and may be rejected as surplusage. Then the plea is good, inasmuch as it follows the form given by the Court as nearly as it can. That plea is framed as applicable to a declaration in its most simple form, and containing only one cause of action. The rule allows the plea to be altered to suit the circumstances; and therefore, supposing that there were two counts only in the declaration, the plea might clearly be pleaded to those two counts; and it may also be pleaded to different parts of the plaintiff's claims, as has been frequently done without objection; for, suppose the identical sums to which the plea is pleaded had been the sums stated in the declaration, the plea would clearly have been good; and therefore, all that the pleader has done is to specify the amounts, which he need not have done.

Lord ABINGER, C. B.—Supposing it appeared at the trial that only 10*l.* was due on the count for goods, and something else on one of the other counts, but in the whole the sum due did not amount to more than 51*l.* 9*s.* 7*d.*, would the plaintiff be entitled to recover—the issue upon the plea being that he has not sustained more damages

than 51*l.* 9*s.* 7*d.* in respect of the causes of action mentioned in the plea?

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ALDERSON, B.—The question is, whether the plea admits that the defendant ever owed more than 51*l.* 9*s.* 7*d.* upon those causes of action stated in the plea; does the 100*l.* in the *indebitatus* count mean any thing else than that something is due? Several hundred pounds are stated in the declaration, and the damages are only laid at 100*l.* The special demurrer assumes that 100*l.*, and not less, is due on the account stated; and therefore, according to the argument for the plaintiff, he would fail at the trial if he did not prove 100*l.* to be due.

Hoggins.—The effect of this plea would be just the same as if these sums had been formerly paid into Court without any plea. Now, the money paid in must be the subject of a plea; and as it is admitted that a plea of payment into Court to the whole declaration or to two counts of a declaration would be good, there is nothing to prevent the defendant from pleading such payment into Court to different parts of the several demands in the declaration, and pleading the general issue to the remainder, as is done here.

Watson, in reply.—The rule is stricter with respect to pleading than it is at *Nisi Prius*. The plea is pleaded to the debt claimed in the declaration, but denies that the plaintiff has sustained damages beyond 51*l.*: and it deviates from the form given by the Court. The other objection, however, is clearly good, because the antecedent form prescribed by the Court declares them to be common counts, and the word “promises” is used, which denotes plurality.

The Court, consisting of Lord ABINGER, BOLLAND,

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ALDERSON, and GURNEY, Barons, took time to consider of their judgment, which was delivered in this term by

LORD ABINGER, C. B. [After stating the pleadings, his Lordship proceeded thus:]—The objections to the plea, on the argument, were two—*First*, that a less sum of money was paid into Court, in satisfaction of a greater certain pecuniary claim, admitted by the plea; and that the sum paid into Court as to each debt is not stated. *Secondly*, that the declaration consists of six counts, and not of two, the plea having been framed on the latter supposition; and this is pointed out as a cause of special demurer. With respect to the first objection, if this had been a plea of payment into Court of the sum of 51*l.* 9*s.* 7*d.*, or a less sum, to the whole declaration, except that part which relates to the bill, it would have been good, for the sums claimed in the declaration are all of them liquidated damages, so as to admit of a payment of money into Court; but the plaintiff is not bound to prove himself entitled to the precise sums alleged, in order to recover; and the defendant, by pleading the payment of money into Court, on such a declaration, though he thereby admits that he did enter into contracts with the plaintiff for money paid, money lent, goods sold, interest, and account stated, does not admit that any *precise* sum was ever due to the plaintiff upon such contract, still less the exact sums mentioned in the declaration; he only admits that some amount of liquidated damages had become due, but denies that the plaintiff was ever entitled to recover more by way of such damages than the sum paid into Court. The plea would be therefore good, so far as relates to the whole of the declaration, except on the bill of exchange. Then, is it necessary to specify how much is paid in on the one part, and how much on the other? It would be extremely inconvenient to defendants to be more restricted in that respect than they were

under the old practice of paying money into Court on the common rule, in place of which this plea is framed; and as it was the constant practice to pay one sum of money into Court generally on all the counts, we see no sufficient reason why this may not be equally done under the new rule. If, then, a plea of payment of 51*l.* 9*s.* 7*d.* into Court on all the demands, except that on the bill of exchange, would be good, there is not the least ground for saying that it would not be good as to part of those demands. Upon the plea in this case, it must be intended that the defendant, knowing for what precise demands the plaintiff is proceeding under this general form, (which an order for particulars always enables him to do), means to dispute, under the plea of *non assumpsit*, all the demands for money paid, lent, and interest, and all for goods sold, except for a parcel in respect of which 12*l.* 2*s.* is claimed; and to admit liability as to that parcel of goods, and on an account stated, but to contest the amount of liquidated damages for such admitted liability. The count on the bill creates some difficulty. Supposing that, to an action on a bill of exchange, there was a plea of payment into Court of a less sum than the amount alleged to be due on the bill, it might be objected that the plea admitted the larger ascertained sum to be *prima facie* due from the defendant, but that the part paid could not satisfy the whole of that sum, and that the plea contained no answer or ground of defence as to the remainder. For if the plea of payment of money into Court should be considered in the nature of a plea of *non assumpsit* as to the residue not paid into Court, it would be inapplicable to a bill of exchange, as to which a plea of *non assumpsit* is inadmissible; and the record would contain no proper answer as to the residue, unless there was an allegation of some special ground of defence in that respect, as part payment, or failure of consideration as to part. It is, therefore, very questionable whether such a plea would be good, and also questionable whether it is made good by the plea of pay-

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ment into Court, on the whole declaration, of a larger sum than the amount of the bill; for so much as would cover that amount is not necessarily to be ascribed to the bill. We do not, however, find it necessary to decide this point, as we are of opinion in favour of the plaintiff on the second ground, but shall permit the defendant to amend his plea; the objection, if it is wrong, may be removed by payment into Court of a certain sum to cover the amount of the bill and interest. The Court think that the last ground of special demurrer must prevail, and that the several demands on the bill of exchange and for money paid, lent, and advanced, and interest, and account stated in the declaration in this form, are to be considered as different counts. This declaration is framed in compliance with the rule of Court, *Trinity Term 1 Will. 4*, in which the demands in *indebitatus assumpsit*, in the form there prescribed, are not treated as one but several counts. They are called money counts; and, in effect, not one sum as the amount of all the demands, but several sums; and not one consideration and promise, but several, are stated, for there is an averment of a promise to pay each sum respectively, in consideration of the defendants being indebted in *that* sum. And if the demands for money paid, &c., are to be treated as one count, the *whole* declaration must be so considered, as the demand on the bill of exchange stands on no different footing from those for money paid, lent, goods sold, interest, and account stated. If the concluding part contains but one promise, it certainly covers the whole declaration, and all is one count. We think, however, for the reason above given, that these demands constitute several counts, and there will be a greater convenience in practice in so treating them; as, where the defendant means to plead severally to each part of the declaration, it will be much more concise and simple to designate such parts as counts; in which latter case nearly the whole of the matter intended to be answered must be recited in the preamble of the plea. The rule of

Court, *Hilary Term 4 Will. 4*, orders that where several debts are alleged in *indebitatus assumpsit* to be due in respect of several matters, the statement of each debt is to be considered as amounting to a several count within the meaning of the rule, which forbids the use of several counts, though one promise to pay only is alleged in consideration of all the debt. This rule has been, on some occasions, considered as implying that they are so only for this purpose; and on the argument of this case we believe an intimation of opinion was given to that effect. On consideration, however, we think that it does not necessarily follow from this provision that they are not separate counts for other purposes also, when framed in the manner in which these are. This clause meets every case of several debts, and treats them as being within the rule forbidding the use of several counts; and if a count were now to be framed, as it used sometimes to be, on the plan recommended by the learned editor of *Saunders*, Vol. 2, p. 121, note (c), for money paid, &c., clearly stated to form part of an entire consideration, with one promise only, still these separate debts would, under this rule, be deemed to be several counts, though they might not be deemed so in pleading. For these reasons, we think that the demurrer must prevail; but it is a case in which, undoubtedly, the defendant must have liberty to amend.

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Leave to amend.

— See *Redgrave v. Mann* - 15 L.J. Q.B. 311.

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TALFOURD, Serjt., moved that judgment of nonsuit might be entered up without costs, in pursuance of the

A plaintiff, administrator, who is nonsuited, is now liable to costs, under the

3 & 4 Will. 4, c. 42, s. 31, unless he can establish a clear case of exemption, by shewing that he has made due inquiries, and that the defendant has been guilty of some misconduct, by withholding information when applied to.

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3 & 4 Will. 4, c. 42, s. 31, under these circumstances:—The plaintiff sued as administrator of one *Millington*, deceased, for the use and occupation by the defendant of a farm belonging to the intestate. At the trial, the plaintiff proved the occupation by the defendant, and the yearly value of the farm as claimed in the particulars. The defendant, in answer, put in receipts, from which it appeared that the rent had been paid, and was also much less in amount than the rent which was claimed. The plaintiff was thereupon nonsuited. From the affidavits in support of the rule it appeared, that administration had been granted to the plaintiff as a creditor of the intestate, that he believed the rent claimed was really due, and that he had been so informed by the widow of the intestate, who was also the defendant's sister, and that the production of the receipts at the trial was a surprise upon him, as he knew nothing of them. It did not appear that any application had been made to the defendant. *Lysons v. Barrow* (a), *Wilkinson v. Edwards* (b), and *Southgate v. Crowley* (c), were referred to; and it was urged that the defendant, by withholding from the plaintiff all knowledge of the receipts, had been the cause of the expenses incurred.

LORD ABINGER, C. B.—There is an inconvenience in calling upon the Court on every occasion to exercise an equitable discretion as to costs. The act was passed for the benefit of defendants; and unless we see clearly that they have forfeited the right which the act gives to them, we ought not to interfere.

PARKE, B.—The act throws the burden of establishing

(a) Ante, Vol. 2, 807; 4 Mpo. & Sc. 463; 10 Bing. 563, S. C.

(b) Ante, Vol. 3, p. 137; 1 Bing. N.C. 301; 1 Scott, 173, S.C.

(c) 1 Bing. N. C. 518; 1 Scott, 374; ante, Vol. 3, p. 386, nom.

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an exemption from costs on the plaintiff, and he ought to make out his title to relief very clearly. If it had appeared that the plaintiff had applied to the defendant to ascertain whether the rent was due, and whether he had any receipts, and the defendant had refused to give any information, and so vexatiously induced the plaintiff to proceed with the action, the case might have been different; but as it does not appear that the defendant has been guilty of any misconduct, I think he ought to have the costs of this action, to which it appears he was not liable.

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ALDERSON and GURNEY, Bs., concurred.

Rule refused.

TABRAM v. WARREN.

THIS was an action by an attorney for his bill of costs, and for money lent.—Plea, never indebted. The cause was tried before the under-sheriff of *Cambridgeshire*. The bill of costs of the plaintiff, as attorney, amounting to 7*l.* odd, was incurred in endeavouring to procure an advance of money for the defendant, for which purpose the plaintiff had endeavoured to sell some property of the defendant while he was in gaol and taking the benefit of the Insolvent Act, but failed; he ultimately effected a mortgage to another attorney of the Insolvent Court, for 23*l.*, part of which went to pay a debt then due from the defendant to the plaintiff; but the deed was afterwards ordered by the Insolvent Court to be delivered up. The plaintiff having proved his retainer by the defendant, it was objected, that the disposal of his property by an insolvent, while he is taking the benefit of the act, was a fraud upon the Insolvent Act; and that, as the plaintiff was party to the fraud, he was not entitled to recover. There was also

An attorney is entitled to recover from an insolvent costs incurred in endeavouring to sell property of the latter, while he is in prison, and taking the benefit of the act, if done *bond fide*, and the insolvent has derived some benefit from it.

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some slight evidence of a loan of money. The plaintiff was nonsuited.

Biggs Andrews obtained a rule *nisi* to set aside the nonsuit, against which

Kelly now shewed cause, and contended that an insolvent, after petitioning the Insolvent Court, could not sell or make away with his property, without violating the act. He adopted the same line of argument as he used on a former occasion, when this Court set aside a *cognovit* given to the plaintiff under similar circumstances (*a*).

Biggs Andrews, in support of the rule.—All that the act requires is, that the insolvent shall give up his property. It does not necessarily follow, that an attempt by an insolvent to sell his property should operate as a fraud upon the creditors; it may be an advantageous sale, and if the creditors think proper to avail themselves of it, they may do so. At all events, even if the sale is void, it does not follow that the attorney is not entitled to recover for work done at the request of the insolvent.

ALDERSON, B.—The 32nd section (*b*) rather shews, that, under certain circumstances, a sale by an insolvent of his property may be good.

PARKE, B.—The only question under the plea was, whether the skill of the plaintiff was not of some use to the defendant, and whether he did not act *bond fide*.

LORD ABINGER, C. B.—I think the nonsuit cannot be supported.

BOLLAND, B., concurred.

Rule absolute for a new trial.

(*a*) See *Tabram v. Freeman*, ante, Vol. 2, p. 375. (*b*) 7 Geo. 4, c. 57.

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WAINWRIGHT v. BLAND and Others.

THE Attorney-General (Sir J. Campbell) moved to stay the proceedings in this action until the plaintiff should give security for costs, under these circumstances:—This action was brought by the executor of a lady deceased, to recover the amount of a policy on her life. The defendants, who were three of the directors of the *Imperial Life Insurance Company*, defended the action, on the ground that there was a fraudulent misrepresentation of the interest of the insurer. The cause came on for trial, but the jury, not being able to agree, were by consent discharged from giving a verdict. The plaintiff afterwards gave a fresh notice of trial. The affidavits stated, that the plaintiff had been accused of two forgeries of powers of attorney, and that the plaintiff was not entitled to any property as executor, and had since left the country, with the intention of avoiding those charges. In answer to an inquiry by the Court, it was admitted that the plaintiff was known to have gone away before the trial. But it was contended, that, under the circumstances, the new trial must be looked upon as a fresh action; and *Seeley v. Powers* (a) was referred to, for the purpose of shewing that the costs of the first trial would not be dependent on the second; and the present motion only had in view the costs of the second trial.

A motion for security for costs must be made as soon as possible after the fact of the plaintiff having gone abroad is known to the defendant.

Lord ABINGER, C. B.—I understand it to be admitted, that proceedings have been taken in this cause since the defendants knew that the plaintiff had gone to reside abroad. According to the general rule, therefore, this application would be too late. It is, however, urged, that the circumstance of the jury having been discharged, takes

(a) Ante, Vol. 3, p. 372; and see *Porter v. Cooper*, Ib. p. 662.

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this case out of the ordinary rule; but that, I think, makes no difference.

PARKE, B.—I am of the same opinion. The rule of *Hilary Term 2 Will. 4*, s. 98, provides, that “an application to compel the plaintiff to give security for costs must, in ordinary cases, be made before issue joined.” This being made after that time, the Court ought to be satisfied that the defendants were not previously aware that the plaintiff had gone to reside abroad, otherwise expense may have been unnecessarily incurred, as the plaintiff might have thought proper to withdraw a juror.

ALDERSON, B.—I also think that the rule must be refused. *De Belloix v. Waterpark* (a), and *Duncan v. Stint* (b), are express authorities that, when such a motion is made after plea, the defendant must shew by affidavit that he was ignorant of the plaintiff's having gone abroad when he pleaded. The principle of those cases applies to the present.

GURNEY, B., concurred.

Rule refused.

(a) 1 B. & Ald. 702.

(b) *Ib.*; and see *Brown v. Wright*, ante, Vol. 1, p. 95, S. P.

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IN THE EXCHEQUER CHAMBER.

EASTON v. PRATCHETT.

(In error from the Court of Exchequer.)

A WRIT of error was brought upon the judgment of this Court in the above case (a).

Cowling, for the plaintiff in error, contended that the plea was bad, because it merely alleged that there was no consideration for the *indorsement*, and that the plea ought to have alleged that there was no consideration for the promise. He cited *Sowerby v. Butcher* (b), and *Stephens v. Wilkinson* (c). He admitted that the objection arising from the words "had and received" in the plea was cured by the verdict.

Crompton, contra.—The promise stated in the declaration is merely an inference of law from the facts there stated. It is necessary that there should be a consideration to support the promise. The jury, by finding the truth of the plea, have in fact found that there was no consideration for the promise.

Lord DENMAN, C. J.—The jury having found that there was no consideration for the defendant's indorse-

To an action on a bill of exchange by the indorsee against the immediate indorser, the defendant pleaded that he indorsed the bill to the plaintiff without having or receiving any consideration: upon which the plaintiff took issue in the terms of the plea. After verdict for the defendant, the plaintiff moved for judgment *non obstante veredicto*, on account of the insufficiency of the plea:—*Held*, that the plea was good after verdict, though it might have been objected to on special demurrer.

Held also, upon error brought in the Exchequer Chamber, that, after the finding of the jury, it must be taken that there was no consideration for the defendant's promise binding in law, and that the judgment for the defendant ought to be affirmed.

(a) See *Easton v. Pratchett*, ante, Vol. 3, p. 472.

(b) 2 Cr. & M. 368.

(c) 2 B. & Ad. 326.

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ment, there is an end of the case. Even if there had been an express promise to pay this bill, yet, there being no consideration for that promise, it could not be binding. It is a mere fallacy to say that the liability of the acceptor can be any new consideration. After the finding of the jury, it must be taken that there is no consideration binding in law, and the judgment must be affirmed.

Judgment affirmed (a).

(a) This case is also reported in 2 C. M. & R. 542.

END OF MICHAELMAS TERM.

KING'S BENCH PRACTICE COURT.

Hilary Term,

IN THE SIXTH YEAR OF THE REIGN OF WILLIAM IV.

MEMORANDA.

THE Lords Commissioners resigned the Great Seal during this Term, and it was delivered to the Right Honourable Sir C. C. Pepys, Master of the Rolls, as Lord Chancellor; and he was raised to the peerage by the title of Baron Cottenham, of Cottenham, in the county of Cambridge.

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Henry Bickersteth, Esquire, K. C., was appointed Master of the Rolls, and created a peer by the title of Baron Langdale, of Langdale, in the county of Westmoreland.

Their Lordships took their seats in their respective Courts on Tuesday, the 19th of January.

REGULÆ GENERALES.

1. **W**HEREAS, by the stat. 4 Hen. 4, c. 18, it was enacted, " That all the attorneys shall be examined by the Justices, and by their discretion their names put on the roll, and they that be good and vertuous and of good fame shall be received and sworn well and truly to serve

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in their offices." And whereas by the stat. 3 Jac. 1, c. 7, s. 2, it was enacted, "That none shall from henceforth be admitted attorneys in any of the King's Courts of Record but such as have been brought up in the same Courts or otherwise well practised in soliciting of causes, and have been found by their dealings to be skilful and of honest disposition, and that none be suffered to solicit any cause or causes in any of the Courts aforesaid but only such as are known to be men of sufficient and honest disposition." And whereas by a rule made in *Michaelmas* Term, 1654, in the Courts of *King's Bench* and *Common Pleas*, it was ordered that the Courts "should once in every year in *Michaelmas* Term nominate twelve or more able and credible practisers, to continue for the ensuing year, to examine such persons as should desire to be admitted attorneys, and appoint convenient times and places for the examination: and the persons desiring to be admitted were first to attend with their proofs of service, then to repair to the persons appointed to examine, and, being approved, to be presented to the Court and sworn." And whereas by the stat. 2 Geo. 2, c. 23, s. 2, it was enacted, "That the Judges, or any one or more of them, should, and they were thereby authorized and required, before they should admit such person to take the oath, to examine and inquire, by such ways and means as they should think proper, touching his fitness and capacity to act as an attorney: and if such Judge or Judges respectively should be thereby satisfied that such person is duly qualified to be admitted to act as an attorney, then, and not otherwise, the said Judge or Judges of the said Courts respectively should, and they were thereby authorized, to administer to such persons the oath thereafter directed to be taken by attorneys: and after such oath taken, to cause him to be admitted an attorney of such Court respectively." And whereas in order to carry the last-mentioned statute more fully into

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effect, it is expedient annually to appoint examiners, subject to the control of the Judges in manner herein-after mentioned, It is Ordered, that the several Masters and Prothonotaries for the time being of the Courts of *King's Bench*, *Common Pleas*, or *Exchequer* respectively, together with twelve attorneys or solicitors, be appointed, by a rule of Court in *Easter Term* in every year, to be examiners for one year: any five of whom (one whereof to be one of the said Masters or Prothonotaries) shall be competent to conduct the examination; and that from and after the last day of next *Easter Term*, subject to such appeal as hereinafter mentioned, no person shall be admitted to be sworn an attorney of any of the Courts, except on production of a certificate signed by the major part of such examiners actually present at and conducting his examination, testifying his fitness and capacity to act as an attorney; such certificate to be in force only to the end of the Term next following the date thereof, unless such time shall be specially extended by the order of a Judge.

2. It is further Ordered, that the examiners so to be appointed shall conduct the said examinations under regulations to be first submitted to and approved by the Judges.

3. And it is further Ordered, that in case any person shall be dissatisfied with the refusal of the examiners to grant such certificate, he shall be at liberty to apply for admission by petition in writing to the Judges, to be delivered to the clerk of the Lord Chief Justice of the Court of *King's Bench*, upon which no fee or gratuity shall be received, which application shall be heard in *Serjeants' Inn Hall*, by not less than three of the Judges.

4. And whereas the Hall or building of the Incorpo-

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rated Law Society of the United Kingdom, in *Chancery Lane*, will be a fit and convenient place for holding the said examination, and the said Society have consented to allow the same to be used for that purpose: It is further Ordered, that until further order such examinations be there held on such days, being within the last ten days of every Term, as the said examiners or any five of them shall appoint; and that any person not previously admitted an attorney of any of the three Courts, and desirous of being admitted, shall, in addition to the notices already required, give a term's notice to the said examiners of his intention to apply for examination, by leaving the same with the secretary of the said Society at their said Hall, which notice shall also state his place or places of residence or service for the last preceding twelve months; and in case of application to be admitted on a refusal of the certificate, shall give ten days' notice, to be served in like manner, of the day appointed for hearing the same.

5. And it is further Ordered, that three days at the least before the commencement of the Term next preceding that in which any person not before admitted shall propose to be admitted an attorney of either of the Courts, he shall cause to be delivered at the Master's or Prothonotary's office, as the case may be, instead of affixing the same on the walls of the Courts as now required, the usual written notices, which shall state, in addition to the particulars now required, his place or places of abode or service for the last preceding twelve months; and the Master or Prothonotary, as the case may be, shall reduce all such notices as in this rule first mentioned into an alphabetical table or tables under convenient heads, and affix the same, on the first day of Term, in some conspicuous place within or near to and on the outside of each Court.

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G. And whereas it is expedient that upon the re-admission of attorneys the Judges should have further means of inquiring as to the circumstances under which persons applying to be re-admitted discontinued to practise, and as to their conduct and employment during the time of such discontinuance, It is further Ordered, that at the time of giving the usual notice of the intention to apply for such re-admission, the party shall cause to be filed the affidavit on which he seeks to be re-admitted, with the Master or Prothonotary, as the case may be; which affidavit shall contain, in addition to the particulars now required, a statement of his place or places of abode during the last preceding year; and such person shall also at the same time cause to be left a copy of such affidavit with the clerk of the Lord Chief Justice of the Court of *King's Bench*; and the rule for the re-admission of such person shall be drawn up on reading such affidavit, and also an affidavit of such copy having been left in compliance with this rule.

(Signed by all the Judges.)

WHEREAS by the act of the 3 & 4 Will. 4, c. 42, s. 43, it is enacted, that none of the several days mentioned in the statute passed in the sessions of Parliament holden in the 5th and 6th year of the reign of King *Edward* the 6th, intituled, "An Act for keeping Holidays and Fasting Days," shall be kept or observed in the Courts of Common Law, or in the several offices belonging thereto, except *Sundays*, the day of the *Nativity* of our Lord, and the three following days, and *Monday* and *Tuesday* in *Easter* week: It is hereby Ordered, that henceforth, in addition to the said days, the following and none other shall be observed or kept as holidays in the several offices belonging to the said Courts, viz.—*Good Friday* and *Easter Eve*,

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and such of the five days following as may not fall in the time of term, but not otherwise: the *Birthday* of our Lord the King, the *Birthday* of our Lady the Queen, the day of the *Accession* of our Lord the King, *Whit Monday*, and *Whit Tuesday*.

(Signed by all the Judges.)

BIRKET v. HOLME.

In order to obtain an attachment for nonpayment of costs, the rule for the payment of them, as well as the rule *nisi* for an attachment for nonpayment, must be personally served.

MARTIN moved to make a rule absolute, for an attachment for nonpayment of costs. He thought it necessary to inform the Court that there had been no personal service of the rule *nisi*. He was aware that the case of *Stunell v. Tower* (a) had decided that an attachment for nonpayment of costs can only be granted on an affidavit of personal service; and that the cases of *Green v. Prosser* (b), and *Allier v. Newton* (c), were thus overruled. But that case was a decision only as to the service of the rule for payment of costs; and therefore was distinguishable from the present, where the rule *nisi* for the attachment had not been personally served. In the present case the rule had been left with the clerk of the defendant at his residence, as several attempts to serve him personally had been made without effect. It was also sworn, that the defendant was keeping out of the way, to avoid being served. There could be no reason why the rule under these circumstances should be considered as different from any other rule *nisi* which it was sought to serve. He cited *Levy v. Duncombe* (d).

PATTESON, J.—I know that some time since cases were decided, in which it was held that strictly personal

(a) Ante, Vol. 2, p. 673.

(b) Ante, Vol. 2, p. 99.

(c) Ante, Vol. 2, p. 582.

(d) Ante, Vol. 3, p. 447.

service was not necessary, where it was clear that the defendant was keeping out of the way, to avoid being served. They have however been since considered, and it has been determined that the service must be strictly personal. There is no distinction between a rule for payment of costs, and a rule *nisi* for an attachment. I cannot grant a rule absolute.

Rule refused.

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BALSON v. MEGGAT.

SHAW shewed cause against a rule *nisi* obtained by *J. Hildyard*, for discharging a rule directed to the sheriff, requiring him to return a writ of *fi. fa.* The grounds on which it was sought to discharge the rule to the sheriff were that, when the writ of *fi. fa.* was delivered to the sheriff, the plaintiff requested a particular officer to be employed to execute the writ; and, *secondly*, that the plaintiff had entered into a compromise with the defendant, through the medium of the officer. In answer to the rule it was contended, that the mere request that a particular officer might be employed to execute the writ, did not constitute him a special bailiff of the plaintiff, so as to relieve the sheriff from the duty of returning the writ. In answer to the second ground for supporting the rule, it was shewn by the affidavits, that the plaintiff was no party to any arrangement between the defendant and the officer. It was moreover shewn, that after the seizure had been effected, and the goods sold, the officer had refused to pay over the proceeds, unless he was allowed to deduct out of them the amount of rent, which a notice from the landlord stated to be due. Under these circumstances there could be no reason for not calling on the sheriff to return the writ.

The mere fact of a plaintiff requesting the sheriff to direct his warrant to a particular officer, does not constitute the latter a special bailiff, so as to render him the plaintiff's agent. The fact of a compromise between the parties, or of a claim for rent by the landlord, does not relieve the sheriff from the necessity of making a return to a writ of *fi. fa.*

J. Hildyard was heard in support of the rule.

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COLERIDGE, J.—I am of opinion that this rule should be discharged. It was obtained on two grounds. The first was, that the sheriff could not be called upon to return the writ, because the plaintiff had appointed a special bailiff. If he was, the sheriff could not be made responsible for his acts, because he had become the agent of the plaintiff. But I do not think that the mere request to the sheriff to deliver his warrant to a particular person, is sufficient to constitute the officer the plaintiff's special bailiff; because we know, in point of practice, that particular bailiffs are employed by certain attorneys to perform all the business of their office. The second ground is, that a compromise has been effected between the plaintiff and the defendant. I do not think the fact of a compromise is sufficiently made out. And if it were so, the sheriff would not be prejudiced, and there would be no reason for his not returning the writ. Then, as to the landlord's claim; if he had a right to this rent, the sheriff might pay it or not, and shew it in his return. I do not say what that return must be. The sheriff must judge of that. The present rule must be discharged with costs.

Rule discharged with costs.

HARRISON v. FORSTER.

The Court will not interfere to restrain a sheriff from selling goods seized by him under a *fi. fa.*, on an offer of indemnity by a third person claiming the goods.

HURLSTONE moved for a rule to shew cause why the sheriff should not be restrained in this case from selling certain goods which had been seized under a *fi. fa.*, on giving an indemnity to the satisfaction of the Master. The application was at the instance of a third person, who laid claim to the goods. On finding they had been seized, together with the goods of the defendant, and that the sheriff was about to sell, notice was given to him that they were the goods of the third person, and an offer

was made by the claimant to give security to the sheriff by way of indemnity, if he would not sell. This indemnity he had refused to accept, and insisted on proceeding with the sale of the goods. It appeared that among the goods in question was a Bible, containing a family pedigree; and it was submitted, that as this would fetch little or nothing at the sale, and was of great value to the owner, the case required the interference of the Court, since if the claimant brought his action, a jury could not well estimate the damage he might sustain by the loss of this Bible.

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PATTESON, J.—The sheriff has a right to sell, if he thinks proper, in obedience to the exigency of the writ; and if he chooses to accept of the indemnity of the plaintiff instead of any other person, I cannot interfere to restrain him.

Rule refused.

DOUGLAS v. WINN.

WIGHTMAN shewed cause against a rule obtained by *Addison*, for judgment as in case of a nonsuit. It was a country cause, and issue was joined in *Trinity* Term last, and no notice of trial was given for the following assizes in the county palatine of *Lancaster*, the venue being in that county. The defendant in the present case, it was contended, was too early in his application. It being a country cause, the plaintiff was not bound to give notice of trial for the assizes immediately succeeding the term in which issue was joined. He cited *Hall v. Buchanan* (a), where it was held, that, by the practice of the Court of *King's Bench*, the plaintiff is not bound to give notice of

By the practice of the Court of *King's Bench*, the plaintiff, in a country cause, has the whole of the term ensuing that in which issue is joined, to give notice of trial.

(a) 2 T. R. p. 734; 2 Tidd, Prac. p. 764, ed. 9.

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trial till the term after that in which issue is joined. If notice of trial had been given, and the plaintiff had made default in proceeding to trial pursuant to the notice, the case would have been different. As it was, the application was too early, and therefore the present rule must be discharged.

Addison referred to the case of *Frampton v. Payne* (a), in which it was held, that where issue is joined early in a term, notice of trial must be given in the same term. Here, issue had been joined early enough to give notice of trial at the last summer assizes; and the plaintiff not having done so, the defendant was entitled to judgment as in case of a nonsuit.

COLERIDGE, J.—The case of *Hall v. Buchanan*, which was decided on the practice of this Court, must regulate my decision. I think the present rule ought to be discharged; and the costs made costs in the cause.

Rule discharged accordingly.

(a) 1 H. Blac. p. 65.

GORDON v. TWINE.

In order to obtain a defendant's discharge, under the 48 Geo. 3, c. 123, the service of the notice of application must be on the plaintiff himself, and not on his attorney.

PETERSDORFF moved to discharge a defendant out of custody, under the 48 Geo. 3, c. 123, he having remained for twelve successive calendar months in execution for a debt not exceeding 20*l*. The affidavit on which he moved, stated the service of the notice to have been on the attorney of the plaintiff.

COLERIDGE, J.—That is not a sufficient service. That was decided as long ago as the case of *Kelly v. Dickinson*

and another (a). It was there determined, that service on the attorney is not sufficient, on a technical, though, as it appears to me, on a right ground, namely, that the attorney's authority is determined with the judgment: The service must be on the plaintiff himself.

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GORDON
v.
TWINE.

Rule discharged.

(a) *Ante*, Vol. 1, p. 546.

SHUTTLEWORTH v. CLARK.

THIS was a sheriff's rule under the Interpleader Act.—*N. Clarke* appeared for the sheriff.—No one appeared for the claimant on the goods seized.

Where the sheriff's rule under the Interpleader Act does not pray costs, and the claimant does not appear, the Court will not, on disposing of the rule, at once order the claimant to pay costs, but will make an order conditional on his not appearing within a certain period.

Addison, who appeared on the part of the execution creditor, applied to have the claim barred, pursuant to the 3rd sect. of the 1 & 2 *Will.* 4, c. 58, and that the claimant should pay the execution creditor his costs of appearing on the sheriff's rule. He cited *Bowdler v. Smith* (a), where it was decided that if an adverse claimant does not appear on the sheriff's rule, the Court will bar his claim, and compel him to pay the judgment creditor his costs of appearing on the sheriff's rule.

COLERIDGE, J.—This rule, it appears, does not call upon the claimant to shew cause against the payment of costs. In the case of *Bowdler v. Smith*, which has been cited, the question as to the mode, or the time, in which those costs should be paid, was not discussed; but in the case of *Perkins v. Burton* (b), where the rule, as in the present case, did not pray for costs, the rule ultimately drawn up was, that the claimant should be barred of his claim; and that unless he shewed cause within four days

(a) *Ante*, Vol. 1, p. 417.

(b) *Ante*, Vol. 2, p. 108.

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from the service of the rule, he should pay the execution creditor his costs. This is an application under section 3 of the Inderpleader Act. In the several cases cited, it is rather singular, that the Court does not appear to have adverted to the terms of the section in question, and it appears to have been considered as perfectly clear, that the Court had a general discretion as to costs to be paid by the claimant. But the words of the section are, after speaking of the non-appearance of the third party to maintain or relinquish his claim, that the Court or a Judge is, "thereupon to make such order, between such *defendant* and the *plaintiff*, as to costs and other matters, as may appear just and reasonable." The power to give costs, therefore, is confined to matters between the plaintiff and the defendant. It is curious that those words of the statute have not been adverted to in the cases decided on it; but I think I am bound by the authority of those cases, as to the power of the Court, to give costs against the claimant. I think, however, that as the rule does not pray for costs, it can only be under very extraordinary circumstances, that the claimant would be required to pay costs without requiring him to shew cause against the application. You may therefore take your rule requiring the claimant to pay the costs now prayed for, unless within ten days he appears to shew cause at chambers.

Rule accordingly.

REX v. The Mayor and Corporation of WELLS.

Where a charter is granted to a corporation to hold a Court for the trial of causes, the disuse of that Court for two hundred years, and the want of funds to hold it, are no answer to a rule for a *mandamus* commanding them to hold it.

ERLE shewed cause against a rule *nisi*, obtained by *Rogers*, for a *mandamus* to be directed to the mayor and corporation of *Wells*, commanding them to hold a certain court for the trial of causes of a limited amount, within the precincts of the corporation. In answer

to the rule, are no answer to a rule for a *mandamus* commanding them to hold it.

to the rule, affidavits were produced shewing that the court in question had been disused for two hundred years; that there were no funds which could be appropriated to the holding of the court; and that no one was acquainted with the practice of the court. Under these circumstances, it was submitted, that the court would not interfere to compel the corporation to hold the court in question.

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 }
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 Wells.

Rogers, in support of the rule, cited the case of *Rex v. the Mayor and Jurats of Hastings* (a), where the lapse of fifty-two years was held to be no objection to the interference of the court by *mandamus*, in order to compel the holding of a court pursuant to a charter, the language of which was permissive. The Court said, "words of permission in an act of Parliament, if tending to promote the public benefit, are always held to be compulsory. If there exist any good reasons for not holding the court, they may be returned to the *mandamus*; but if there are no such reasons, the interests of the inhabitants must be respected. The court was evidently intended for their benefit, and is likely to promote their benefit, and it would be great injustice to narrow their privileges by discharging this rule. We are all of opinion, that the inhabitants of this port have an interest in the holding of this court; and although the relator in this case is not a corporator, yet we think the corporation ought to hold the court for the benefit of the inhabitants, for it is clear they have power so to do under the charter. It may be of great benefit to the inhabitants that there should be a jurisdiction conducted according to the ancient common law of the country. It is by the disuse of so many of these courts, that the legislature have found it necessary to institute new modes for the recovery of debts, not so well known in the ancient constitution."

(a) 1 D. & R. 148.

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PATTESON, J.—I do not think I have any discretion on the subject. The power to hold this court being granted by the charter, I do not think that the corporation can lay it aside merely on the ground of want of funds; and as to length of time, I cannot distinguish between fifty-two years in the case cited, and two hundred. The present rule must therefore be made absolute.

Rule absolute.

DENNEHAYE v. RICHARDSON.

Where the plaintiff has made several defaults in proceeding to trial pursuant to his peremptory undertaking, the Court may make the payment of the costs of the last default a condition precedent to enlarging his last undertaking.

HUMFREY shewed cause against a rule *nisi* for enlarging a peremptory undertaking. He had no objection to the enlargement, but he wished to engraft on the rule, as a condition precedent, that the costs of the last default should be paid previous to the rule being drawn up. There had been three defaults in the present case. Great injury was done to the defendant by the constant pendency of this action.

PATTESON, J., referred to the words of 1 *Reg. Gen. Hilary Term*, 2 *Will.* 4, s. 69 (a), by which it was ordered, that “the Court on discharging a rule for judgment as in case of a nonsuit, may order the plaintiff to pay the costs of not proceeding to trial, but the payment of such costs shall not be made a condition of discharging the rule.” To render the payment of costs a condition precedent to drawing up the rule in the present case would be directly contrary to the directions of the rule of Court.

Humfrey submitted, that the rule of Court in question only applied to cases of the first default, where the appli-

(a) Ante, Vol. 1, p. 192.

cation was made for judgment as in case of a nonsuit; but here there had been three defaults; and the application was not on the part of the defendant for judgment as in case of a nonsuit, but on the part of the plaintiff to enlarge his peremptory undertaking. The plaintiff, therefore, was himself coming to ask a favour, and consequently might be laid under terms by the Court as a condition of his obtaining that favour. In the Court of *Exchequer* it was the constant practice in applications, after the first default, to make the payment of costs a condition precedent on the part of the plaintiff.

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Cur. adv. vult.

PATTESON, J.—I have referred to the Judges of the *Exchequer*, and I find it is their practice in applications, after the first default has been disposed of, to make the payment of costs of a subsequent default a condition precedent to granting the plaintiff the indulgence he requires. This appears to me to be a case in which such a discretion should be exercised, and therefore I think that this rule should be made absolute, only on condition of paying the costs on the last default.

Rule absolute accordingly.

See Doe d. Kinnick v. Re. 5. B. & L. 570.

DOE d. DOWNES v. ROE.

WHATELEY moved for judgment against the casual ejector. The peculiarity in the case was, that the affidavit, contrary to the usual form, omitted to state that the notice had been read over and explained to the tenant in possession; but it stated that "he appeared to be acquainted with the intent of the declaration." It also appeared, that

The Court granted a rule nisi for judgment against the casual ejector, on an affidavit merely stating that the tenant "appeared to be acquainted with

the intent of the declaration," without stating that it had been either read or explained to him.

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the tenant was a sheriff's officer, and therefore it was submitted that he was, from his connexion with the law, a person likely to know the intent and meaning of the process.

PATTERSON, J.—I think the affidavit does not state a sufficient service. The deponent ought to have shewn that he had read over and explained the notice, or at least that he had begun to do so, and was prevented by the tenant from proceeding. You may, however, have a rule to shew cause.

Rule *nisi* granted.

DRINKER v. PASCOE.

The rule of 1796, concerning costs on rules discharged without any direction as to costs, is strictly confined to applications on the ground of irregularity, either mentioned in the rule or in the affidavit. In all other cases where rules are moved with costs, and discharged generally without saying any thing about costs, the successful party will not be entitled to them. A special direction must be given by the Court in order to enable him to obtain them.

MARTIN moved for a rule to shew cause why an attorney should not be exonerated from payment of certain costs, under these circumstances.—An application had been made in the last term to stay certain proceedings in the present action, on the ground that they had not been commenced by the authority of the client. The rule was moved with costs. The Court, after hearing the rule discussed, directed it to be discharged, without saying any thing about the costs, as far as *Martin* could recollect. Mr. *Platt*, however, on the other side, had indorsed his brief "Rule discharged, with costs." On inquiry, it appeared that Mr. *Platt* had, on the rule being discharged, applied for costs, when the Chief Justice said, "Is there any occasion to say any thing about them?" Now, the construction, he should contend, which ought to be put upon those words was, that nothing was directed about costs, and therefore the rule ought to be considered as discharged without costs. The practice, it was apprehended, was, that when a rule, although moved with costs, was dis-

charged without saying any thing about costs, it must be considered as discharged without costs. In order to give the successful party the costs of opposing the application, it was necessary for the Court to give a special direction to that effect. The present case was not a motion founded on an alleged irregularity, and therefore did not come within the rule of Court of *Michaelmas* Term, 1796 (a). The words of that rule were—"That in all cases where a rule is obtained to shew cause why proceedings should not be set aside for irregularity, with costs, and such rule is afterwards discharged generally, without any special direction upon the matter of costs, it is understood to be discharged with costs, and the latter rule must be drawn up accordingly." In such cases the words of the rule directed the course to be pursued; but the present case not coming within that rule, it must remain subject to the ordinary practice where the Court gave no directions as to costs.

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Platt opposed the application, and contended that the observation of the Chief Justice must be considered either as a direction that the rule should be discharged with costs, or as a recognition of the practice, that, where a rule had been moved with costs, and it was discharged without saying any thing about costs, it must be taken to be discharged with costs. That was the practice in all cases, quite independent of the rule of *Michaelmas* Term, 1796. The fact of that rule applying only to cases of irregularity, did not at all interfere with the acknowledged practice in other cases, where applications were made praying for costs.

Cur. adv. vult.

PATTESON, J.—I have spoken to the Chief Justice on the subject of this motion, but he had no recollection

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of the facts. I mentioned to him how the case stood, and he has no doubt that Mr. *Platt's* indorsement on his brief was correct. I have looked into the practice, and I think it is quite clear that the rule of *Michaelmas* Term, 1796, applies only to cases of irregularity, and does not in any way extend to a rule of this sort, which was moved for on different grounds. I don't mean to say, that, if the rule should omit the word "irregularity," and it should appear by the affidavits supporting the motion that the foundation of it was irregularity, and that the Court said nothing about costs, they would not follow there also. I am also quite clearly of opinion, that in all cases, except where motions are made for irregularity, and that the rule *nisi* is moved with costs, and it is discharged generally, without saying any thing about costs, the successful party is not entitled to costs; and that, in order to give him costs, the Court must give an express direction to that effect. Now, this is not a case of irregularity, but was an application to stay proceedings on the ground of their being unauthorized by the client. I should have some difficulty if the rule had been drawn up merely without saying anything about costs, in interfering with the question afterwards. If it were a mistake of the officer, then it might be corrected. But if it were omitted through inadvertency, then the party would be entitled to take advantage of that inadvertency. But the rule was drawn up "discharged with costs;" and that being so, the question is, whether the Court is to disturb the rule. If the Court did not mean to give the costs, then it might interfere; but if, upon the view of the whole case, it is clear that the costs ought to have been given, and as if it were *res integra*, I should give them. I think these costs ought to be allowed.

Rule accordingly.

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REX v. GILES.

BALL moved to make a rule absolute for an attachment. The rule had been drawn up calling on the defendant to shew cause on the 21st, but had not been served till the 20th. The rule would be regularly due on the 22nd, but he had now waited until the 26th before he had applied to make it absolute. He had received no intimation that any one shewed cause against it.

Where a reasonable time had not been given between the day of serving a rule for an attachment and the day of shewing cause, the Court, on making the rule absolute, directed the attachment to lie in the office a few days, until notice of that step being taken should be given to the defendant.

PATTESON, J.—I think you may make your rule absolute; but let the attachment lie in the office for a few days, until notice has been given to the defendant that the rule has been made absolute against him.

Rule absolute.

FRODSHAM v. ROUND.

STEER shewed cause against a rule *nisi* obtained by **George** for judgment as in case of a nonsuit. The amount indorsed on the writ was more than 20*l.*, but the real sum claimed by the plaintiff, after allowing payments in deduction, was less than that amount, and the cause might be tried before the sheriff. The plaintiff was desirous of trying it before that tribunal, and to give a peremptory undertaking for that purpose.

If the sum indorsed on the writ of summons exceeds 20*l.*, the cause cannot be tried before the sheriff, but the Court on motion, at the instance of the plaintiff, will amend the indorsement by substituting a less sum, being the amount due upon the balance, so as to obtain a writ of trial.

George, contra, submitted, that the peremptory undertaking ought to be to try at the assizes, and not before the sheriff, the sum indorsed on the writ amounting to more than 20*l.* The only cases in which the issue could be tried before the sheriff were, according to the provisions of the 3 & 4 Will. 4, c. 42, s. 17, "in any action depending in any of the said superior Courts for any debt or demand, in which the sum sought to be re-

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covered, and *indorsed on the writ* of summons, shall not exceed 20*l.*." Here the sum indorsed on the writ did exceed 20*l.*; and, consequently, the cause could not be tried before the sheriff.

PATTESON, J.—As the writ now stands, according to the language of the 3 & 4 *Will.* 4, c. 42, s. 17, the peremptory undertaking cannot be to try before the sheriff; because the words are, "*indorsed on the writ.*" The particulars, however, claim a smaller amount than 20*l.*, and therefore, a motion might be made to amend the indorsement on the writ by substituting the sum claimed in the particulars. My practice is, to direct that if the defendant chooses to pay the substituted sum, together with the costs of the writ, within a limited time, he may do so. As the rule at present stands, I can do no more than discharge it on a peremptory undertaking to proceed to trial at the assizes.

Steer then applied to amend the indorsement on the writ, by reducing it to the amount claimed in the particulars.

PATTESON, J.—The rule will therefore be, that the writ shall be amended by reducing the sum indorsed on the back of it, to that claimed in the particulars, and that the plaintiff should give a peremptory undertaking to proceed to trial at the Sheriff's Court, and that a writ of trial shall go unless the defendant within a fortnight shall pay the substituted sum, with the costs of the writ only. I do not think that the plaintiff should pay the costs of this rule, because it is a sufficient penalty upon him to lose all his costs except those of the writ, if they, together with the reduced sum, are paid within a fortnight by the defendant.

Rule accordingly.

1836.

SMITH v. DIXON.

ARCHBOLD shewed cause against a rule *nisi* obtained by *Wightman* for adding a plea of no contract in writing to that of *non assumpsit*. It was an action for the non-delivery of certain furs after the expiration of a year. The plea of *non assumpsit* had been first pleaded. An application was then made in last *Michaelmas* Term, for leave to add the plea in question. The Judge, to whom the application was made at chambers, feeling some doubt as to the necessity of the plea, referred the parties to the Court. No application was made during that term, and now in the present, this rule was obtained. He contended that the application was too late, and cited *Cox v. Holt* (a), where the Court refused to permit the defendant to add a plea of the Statute of Limitations to that of the general issue. The reason there given was, that the plea did not tend to the furtherance of justice, and therefore the Court would not allow its addition. The plea now sought to be added certainly came within the reason of that case, for it could not be considered as tending to further justice.

Where it is doubtful whether a statutable objection to the contract can be rendered available under the plea of *non assumpsit*, the Court will allow it to be specially pleaded.

Wightman, in support of the rule, contended, that there was no objection, under the circumstances of this case, to the defendant being permitted to plead the plea in question, which was rendered necessary by the 4th section of the Statute of Frauds. With respect to the delay which had occurred in coming to the Court, the cause of the application being made at all was an intimation given by the Court of *Exchequer*, since the summons before the Judge, that the objection of the contract not being in writing could not be taken under the plea of *non assumpsit*. If it could be taken under the plea already pleaded, the

(a) 2 Wilson, p. 253.

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defendant did not desire to add the plea; but, after the suggestion of the Court of *Exchequer*, the defendant could not proceed to trial safely without putting a plea of the Statute of Frauds on the record.

PATTESON, J.—I think you may have liberty to add the plea in question. The only object of this application is to be certain of an opportunity to take advantage of the Statute of Frauds. There is considerable doubt whether the defendant can, under the plea of *non assumpsit*, take the objection sought to be raised by this plea. The plea may be added, and the costs of the application will be costs in the cause. The present rule must, therefore, be made absolute.

Rule absolute (a).

(a) See *Barnett v. Glossop*, ante, Vol. 3, p. 625.

OWEN v. HOLLES.

The affidavit of the attesting witness to a warrant of attorney, cannot be dispensed with merely on the ground of his illness.

R. V. RICHARDS moved for leave to sign judgment on an old warrant of attorney. The only peculiarity in the case was, that he had not the affidavit of the attesting witness to the warrant. The reason that the attesting witness had not made an affidavit was, that he was confined to his bed by illness at *Woolwich*. He had, however, the affidavit of the son to the handwriting of the father.

PATTESON, J.—That is not sufficient. If it were shewn that the attesting witness was out of the country, or dead, it might be different. But the Court cannot dispense with the affidavit of the attesting witness merely on the ground of his illness; because a commissioner might attend him and take his affidavit. The present rule, therefore, cannot be granted.

Rule refused.

1836.

Ex parte Roy.

CROWDER moved for a rule to shew cause why the assignees of an attorney should not deliver up certain title deeds, which had been deposited in the hands of the bankrupt by the applicant, who was his client. No instance, it was believed, could be found reported, in which a similar application had been made; but it seemed only reasonable that such an interference on the part of the Court should take place, as, without it, great hardship would be imposed on the client. The deeds in question were title deeds, and the gentleman on whose behalf the application was made was desirous of raising money on his estate. Without the title deeds it would be impossible for him to fulfil his desire. It was true that the assignees were not officers of the Court, and therefore it might be said that the Court had no summary jurisdiction over them. It was, however, clear, that if the deeds were still in the hands of the attorney, the Court would interfere summarily. The assignees could have no rights beyond those possessed by the bankrupt. It seemed only reasonable, then, that they should be under the same liability as he, to the summary jurisdiction of the Court. If the applicant were compelled to have recourse to an action, the greatest inconvenience and injury would be inflicted on him.

Where a client has deposited deeds in the hands of his attorney, and the latter afterwards becomes bankrupt, the Court will not summarily interfere to compel the assignees to deliver up those deeds which have come to their hands from the bankrupt.

Cur. adv. vult.

COLERIDGE, J.—I have spoken to the other Judges of the Court, and we are all of opinion that we have no power to interfere summarily against the assignees.

Rule refused.

1836.

The Court will not compel a plaintiff to give security for costs already incurred.

During the pendency of a rule for a new trial obtained by the plaintiff, the Court will not compel him to give security for the future costs in the cause.

OXENDEN v. CROPPER.

WHITEHURST moved for a rule to shew cause why the plaintiff should not give security for costs, or why the defendant should not be at liberty to sign final judgment, and issue execution thereon for his costs, notwithstanding the rule *nisi* for a new trial, which the plaintiff had obtained. The affidavit, on which he moved, disclosed these facts.—It was an action of trespass, and the cause was tried at the last Summer Assizes, when a verdict was found for the defendant. In the month of *September* the plaintiff, who, it was sworn, was altogether insolvent, and had been confined two years previously in the *Fleet*, on his liberation took refuge in *Paris*. In the month of *November* following a rule *nisi* for a new trial was obtained. The case was now in the new trial paper, in which there was considerable arrear, and thus great delay would be caused, unless the Court interfered, by granting the rule now prayed. There was good reason to believe, that if all the facts of the case had been stated to the Court, the rule *nisi* for a new trial would not have been granted.

PATTESON, J.—The costs in question have already been incurred, and I do not think the rule with respect to security for costs applies to those already incurred.

Whitehurst then applied for security for the future costs, which might be hereafter incurred.

PATTESON, J.—If the Court has a doubt as to the propriety of the verdict, the plaintiff has a right to the benefit of that doubt, wherever he may be. I know of no instance where such an application has been granted. I think I cannot interfere to grant this motion, as, if I did, the only

mode of enforcing the object of it would be the alternative of ordering final judgment to be entered up, in a case in which the full Court has expressed an opinion that it ought not to be entered up, at least without further consideration.

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Rule refused.

— *Wade v. The Ld. W. P. Co. 28. 11. 1836. 98.*

WAITE v. SPURGIN.

KELLY moved for a rule to shew cause why the Master's taxation in this case should not be reviewed, on the ground of his having refused to allow certain costs of a former trial. The cause had been tried, and after the summing up of the learned Judge, the jury retired. Notwithstanding a very protracted consideration of the case, they were unable to agree upon their verdict. The learned Judge then discharged them, without finding any verdict. The cause went down for trial a second time, and then the plaintiff obtained a verdict. On taxation, the Master refused to allow the costs of the plaintiff on the unsuccessful attempt at trial. This refusal was the ground of objecting to the taxation.

Where a jury is discharged by the Judge, of his own authority, from finding a verdict, they being unable to agree, the ultimately successful party is not entitled to the costs of the first attempt at trial.

PATTESON, J.—I think the Master was right in refusing to allow these costs. This point was settled in the case of *Seely v. Powers* (a). There, it was held, that if a Judge, of his own authority, discharges a jury from giving a verdict, on the ground of their not being able to agree, the party ultimately successful will not be entitled to the costs of the first attempt at trial. That was a decision of my own, but I took time to consider, and examined the authorities on the subject, and the result of my inquiries was, that the ultimately successful party was not entitled

(a) Ante, Vol. 3, p. 372.

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to costs attendant on endeavouring to try the cause. The rule now prayed must be refused.

Rule refused.

MILTON v. RAWLINGS.

Where it is necessary to move to confirm the Master's report.

HENRY moved for a rule to shew cause why the Master's report in this case should not be confirmed. Certain matters in the case had been referred to the Master, but no discretion had been given to him as to costs.

PATTESON, J.—As no discretion has been given to the Master as to the costs, it was necessary that you should come to the Court in order to obtain your costs. Had the Master been invested with a discretion as to costs, the rule for confirming the Master's report would have been drawn up on the mere production of the report at the Rule Office. You may therefore have your rule.

Rule *nisi* granted.

AUSTIN v. GRANGE.

If the words "before me," in the *jurat* of an affidavit, are struck out, and the words "by the Court" introduced, it is not an objection.

CHANNELL moved to be allowed to effect a special service of a rule on the defendant. He thought it right to call the attention of the Court to the *jurat* of the affidavit on which he moved. It was originally intended to swear it in the country before a commissioner, and accordingly the words "before me" were introduced. Subsequently it was determined to swear it before the officer of the Court. The words "before me" were then struck out, and the words "by the Court" introduced. The question was, whether this constituted any objection to the affidavit.

PATTESON, J. (after consulting with Master *Goderich*) held, that it was no objection.

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Rule granted.

AUSTIN
v.
GRANGE.

DOE *d.* JORDAN *v.* ROE.

JOHN BAYLEY moved for judgment against the casual ejector. The premises in question were in the joint possession of two persons. The declaration was directed to them both, and was read over and explained to one in the presence of the other.

Service in
ejectment.

PATTESON, J.—I think that is a sufficient service.

Rule granted.

MASTERS *v.* CARTER.

ON shewing cause against a rule for a new trial, it was objected that only the initial of the defendant's Christian name was introduced in the intitlings of the affidavit on which the rule had been obtained.

The Christian names of the parties in a cause must be written at length in the title of an affidavit.

PATTESON, J.—It is an established rule, that the Christian name of the parties must be written at length in the title of an affidavit. The present rule must be discharged.

Rule discharged.

GADDERER *v.* SHEPPARD.

ERLE shewed cause against a rule obtained by *Mansel* for setting aside two writs of detainer against the defendant, and for discharging him out of custody, with costs. The first writ was irregular, as the sum in the indorsement as to bail, "Bail by affidavit for £—," was not

A plaintiff cannot lodge a detainer against a defendant, and then, having on the ground of a defect in the writ, treated it

as a nullity, lodge a second detainer against him.

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filled up. The plaintiff's attorney, on the day when the writ was lodged with the Marshal, discovering the mistake, gave him and the defendant notice not to act on the first writ, and issued a second writ of detainer. *Erle* contended that this proceeding was regular; that the plaintiff had treated the first writ as a nullity; and that, as the defendant was in custody in other suits, the plaintiff might properly do so.

Mansel, contra, contended that this case was within the spirit of the rules of Court, *Mich. 15 Car. 2, 1663, 1 Reg. Gen. H. T. 2 Will. 4, s. 7 (a)*, and of the principle of law, *nemo debet bis vexari pro eadem causa*, prohibiting a second arrest for the same cause; that the defendant was detained under the first writ, and by the act of the plaintiff. The second writ, therefore, which operated like a second arrest, could not be supported.

PATTESON, J.—If each of these writs had been a *capias*, the plaintiff could not have taken the defendant under the first writ, and, finding it irregular, treat it as a nullity, and arrest the defendant a second time, on another writ, for the same debt. The same principle, it appears to me, is applicable to writs of detainer.

Rule absolute.

(a) Ante, Vol. 1, p. 184.

RICKETS v. BURMAN.

A motion for entering a nonsuit cannot be made, unless leave has been reserved for that purpose by the Judge trying the cause.

ARCHBOLD shewed cause against a rule *nisi* obtained by *C. Chadwicke Jones* for a nonsuit. The cause had been tried before the sheriff, and a verdict found for the plaintiff. No leave had been obtained for a motion to enter a nonsuit, and, therefore, the rule must be discharged.

C. Chadwicke Jones supported his rule.

PATTESON, J.—You cannot move to enter a nonsuit, unless leave has been given to you for that purpose by the Judge at the trial. The present rule must therefore be discharged.

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Rule discharged.

LOVEITT v. HILL.

WIGHTMAN shewed cause against a rule *nisi*, obtained by *Mansel* for discharging the defendant in this case out of the custody of the sheriff, on the ground of an irregular arrest. The facts, as they appeared on the affidavits in support of the rule, were the following:—The defendant was in custody of the gaoler of *Linton Peveril*, which is a local jurisdiction within the county of *Nottingham*. He obtained his discharge from that execution at four o'clock in the afternoon. The keeper of the gaol, however, refused to allow him to go, on the ground that he was indebted for lodgings and ale, with which he had been supplied in the prison. At eight o'clock that evening, however, the gaoler told him that he was at liberty, and might leave the prison. The moment he attempted to go, he was arrested by bailiffs, in pursuance of a writ of *capias* in the present action. He was then removed in custody to the county gaol at *Nottingham*, where he now remained. The writ described the defendant as "of the gaol of *Linton Peveril*." The objections taken to the plaintiff's proceedings were four. The first was, that the description of the defendant in the writ of *capias* was not sufficient.

In a *capias*, "of the gaol of *Linton Peveril*," is a sufficient description of a defendant.

It is no objection to an arrest, that it takes place in a gaol, if a defendant is there for his own purposes.

LITLEDAL, J.—I think the description is sufficient.

Wightman—The second objection is, that the plaintiff has not adopted the proper course in arresting the defen-

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dant on a writ of *capias*. It was said, that the proper proceeding to adopt was, the defendant being in custody in an inferior jurisdiction, to bring the defendant up on a *habeas corpus*, and detain him on a *capias*. The third objection was, that, as the defendant was in unlawful custody, he being improperly detained by the gaoler at the time when the arrest took place, or had only been just discharged from such custody at the time, the arrest was irregular. With respect to these two objections, however, no difficulty would arise, because it was sworn, in answer to the rule, that the defendant was not detained at all by the gaoler after four o'clock, but had remained there until the time of the arrest of his own accord, in order to avoid being arrested for debt. The plaintiff, therefore, was regular in treating the defendant as if he had never been in custody at all. The fourth objection was, that the arrest ought not to have been effected within the precincts of the gaol. This was an objection which could not be sustained, as there could be no more reason for not arresting a defendant who was remaining of his own accord and collusively in prison, than for not arresting the gaoler himself, if a *capias* were issued against him.

Mansel was heard in support of the rule.

LITLEDALE, J.—There is no objection to the arrest, on the ground of the defendant being in gaol, he being there for his own purposes in order to avoid process issued against him. The fact of his being within the precincts of the gaol at the time is equally unobjectionable. The writ is directed to the sheriff, and he takes the defendant wherever he can find him. The present rule must, therefore, be discharged.

Rule discharged, without costs.

1836.

GRANT *v.* WILLIS.

W. CLARKSON moved for a rule to take a certain sum of money out of Court, which had been deposited in lieu of bail, pursuant to the 7 & 8 *Geo. 4*, c. 71, s. 2., the plaintiff having been nonsuited. The only question was, whether the rule ought to be absolute or *nisi* in the first instance.

The rule for taking money, deposited in lieu of bail, out of Court, in consequence of the plaintiff's becoming nonsuit, is *nisi* in the first instance.

PATTESON, J., (after consulting with Mr. *Hill*, the clerk of the rules), was of opinion, that the rule must be *nisi* in the first instance.

Rule *nisi* accordingly.

BROWN *v.* JENKS.

ADDISON moved for an attachment for non-payment of a certain sum, pursuant to a rule of Court. The rule required payment "to the plaintiff or his agent." The demand had been made by a person acting for the plaintiff, but who had not been authorized by a power of attorney. The question was, whether, from the peculiar language of the rule, a power of attorney was necessary to enable the person making the demand to do so with such effect as to bring the defendant into contempt by non-payment of the money in accordance with the demand.

If money is ordered to be paid to a certain person (not an attorney) or his agent, the demand must either be made by himself or some one authorized by a power of attorney.

PATTESON, J.—I think the demand should have been made in pursuance of a power of attorney. If the plaintiff had been an attorney, and the demand made by his *London* agent, it might have been different. A fresh demand must be made, in order to obtain an attachment.

Rule refused.

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RYAN v. FURNELL.

The rule for an attachment for non-payment of a sum of money found due by an attorney to his client, on a reference to the Master, pursuant to a rule of Court, is *nisi* in the first instance.

BARSTOW moved for an attachment for non-payment of a sum of money pursuant the Master's *allocatur*. The matters of a former rule had been referred to the Master, to ascertain what amount of money was due to the plaintiff from his attorney. The only question was, whether the rule should be absolute or *nisi* in the first instance. He should contend, that the rule must be absolute in the first instance. The present was unlike the ordinary case of a reference of accounts between attorney and client to the Master, and the Master finding a certain sum to be due; for here the reference was in pursuance of a rule of Court, that rule in fact sanctioning the judgment which the Master should form on the subject. By disobedience to that rule, he had been guilty of a contempt, and consequently there could be no necessity for a rule *nisi*. It ought to be absolute in the first instance.

PATTESON, J.—This is not like the ordinary case of a non-payment of costs, pursuant to the Master's *allocatur*. The rule must be *nisi* in the first instance.

Rule *nisi* accordingly.

THOMSON v. KING.

It is no objection to the discharge of a debtor, under the 48 Geo. 3, c. 123, that the amount of the debt for which he is in execution is *exactly* 20*l*.

S. HUGHES moved for the discharge of a debtor, who had remained in execution during a space of twelve successive calendar months, for a sum not exceeding 20*l*. The sum for which he was in execution amounted to *exactly* 20*l*. This, he apprehended, was no objection, according to the language of the statute. He cited *Harris v. Parker* (a),

(a) Ante, Vol. 3, p. 451.

where it had been held, that though the judgment is in debt for 100*l.*, yet if the execution against the defendant is for less than 20*l.*, the defendant may be discharged out of custody, after being in prison twelve months, without reducing the judgment.

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PATTESON, J.—The words of the statute are “not exceeding 20*l.*” The amount for which the defendant is in execution does not exceed that sum, and, therefore, no objection to his discharge exists.

Rule granted.

CLARIDGE v. SMITH.

J. BAILEY shewed cause against a rule obtained by *Thomas*, for entering a suggestion under the *Southwark* Court of Requests Acts, the 22 *Geo.* 2, c. 47, the 32 *Geo.* 2, c. 6, and the 46 *Geo.* 3, c. lxxxvii.; or in the alternative to obtain a certificate under the 43 *Eliz.* c. 6, s. 2 (a), on the ground of the plaintiff having recovered less than 40*s.* The answer he should give to the first branch of the rule, that the clauses in the *Southwark* Court of Requests Act, under which this application was made, was repealed by the 4 *Geo.* 4, c. cxxiii. ss. 13, 14, 16.

The 4th of *Geo.* 4, c. cxxiii., repeals the previous *Southwark* Court of Requests Acts, as to depriving a plaintiff of costs where he recovers less than 40*s.*

The 43 *Eliz.* c. 6, s. 2, only empowers the Judge who tries the cause to give the certificate, under that act, to deprive the plaintiff of costs. And in case of executing a writ of inquiry, whether before a Judge or a sheriff, the certificate cannot be granted.

PATTESON, J., (after examining the acts referred to) was of opinion that the clauses on which the application was founded were now repealed.

J. Bailey.—The answer to the second part of the rule was, that this was a judgment by default, and an inquiry

(a) Such a certificate may be in- and even after taxation. *Foxall*
dorsed on the *postea* and may be v. *Banks*, 5 B. & Ald. 536.
granted after the trial of the cause,

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had been executed before the under-sheriff; and, therefore, not coming within the meaning of the 43 *Eliz.* c. 6, s. 2. That section only applied to trials before a Judge at *Nisi Prius*. The Judge alone was the proper person to exercise his discretion with respect to the certificate to be granted. The present rule ought therefore to be discharged.

Thomas was heard in support of the rule.

PATTERSON, J.—The words of the 43 *Eliz.* c. 6, s. 2, are, “If upon any action personal to be brought in any of Her Majesty’s Courts at *Westminster*, not being for any title or interest of lands, nor concerning the freehold or inheritance of any lands, nor for any battery, it shall appear to the Judges of the same Court, and so signified or set down by the Justices, before whom the same shall be tried, that the debt or damages to be recovered therein in the same Court shall not amount to the sum of forty shillings, or above, that in every such case the Judges and Justices before whom any such action shall be pursued, shall not award for costs to the party plaintiff any greater or more costs than the sum of the debt or damages so recovered shall amount unto, but less at their discretions.” The Judge therefore, by the language of the statute, is the only person who can grant the certificate; and the Legislature has not thought it right to invest the sheriff with such a power. The present rule must therefore be discharged.

Rule discharged with costs.

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BROWN v. DAUBENY.

BALL shewed cause against a rule *nisi*, for setting aside the verdict for the defendant in this case, and for a new trial, on the ground of misdirection by the Secondary, before whom the cause was tried, or to enter a nonsuit. It was an action of debt for goods sold and delivered. The defendant pleaded a set-off as to the sum of 2*l.* 10*s.*, and never was indebted to the remainder of the claim. The plaintiff replied "*never was indebted*" to the plea of set-off. On this replication, issue was joined. At the trial a set-off, to the amount of 2*l.* 10*s.*, was proved by the defendant. The plaintiff then sought to give evidence in support of his replication, that the sum of 2*l.* 10*s.* had been paid. The Secondary refused to receive this evidence, on the ground that the issue raised on these pleadings was, whether the plaintiff ever was indebted to the defendant. Evidence had been given that a debt did exist, and the plaintiff could not now be let in to shew that that debt had been paid, as that evidence was immaterial upon the issue as to whether a debt did at any time exist on the part of the plaintiff to the defendant. The Secondary accordingly refused to receive the evidence; and stated that he should direct the jury to find for the defendant. Whereupon, *Mansel*, the counsel for the plaintiff, stated that under that direction, he must elect to be nonsuited. The Secondary refused to nonsuit, except unconditionally—which being refused by the plaintiff's counsel, a verdict was, under the direction of the Secondary, given for the defendant. The present rule had been obtained to set aside the verdict, and for a new trial or nonsuit.

If the plaintiff replies *nunquam indebtedatus* to a plea of set-off, and the defendant proves his plea, the plaintiff will not be at liberty under his replication to shew that the sum proved, or even any part, has been paid.

The new rules of pleading do not apply to replications.

Ball now contended that the ruling of the Secondary was correct. The plaintiff had chosen to raise the issue

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by his replication not as to the actual state of accounts between the parties, but whether or not a debt did at any time exist from the plaintiff to the defendant. On that issue it must be immaterial whether that debt had been paid or not. The present rule ought, therefore, to be discharged.

Mansel, in support of the rule, contended, that the evidence tendered by the plaintiff had been improperly rejected. He cited *Shirley v. Jacobs* (a), wherein it was held that in *assumpsit* against the acceptor of a bill of exchange, part payment may be given in evidence under a plea denying the acceptance in reduction of damages. Under any circumstances, the plaintiff would be at liberty to prove that the debt was paid by reducing the claim set up by the defendant in his set-off.

PATTESON, J.—The present question is somewhat novel, and I will therefore take time to consider.

Cur. adv. vult.

PATTESON, J.—It appears to me that the present rule ought to be discharged. In order satisfactorily to determine this case, it is necessary to observe very closely the issue raised upon these pleadings. The plaintiff declares in debt for goods sold and delivered. The defendant pleads a set-off to 2*l.* 10*s.*, and "*nunquam indebitatus*" to the remainder of the plaintiff's demand. The plaintiff replies "*nunquam indebitatus*" to the plea of set-off, and joins issue on the second plea. The defendant joins issue in his rejoinder on the replication of *nunquam indebitatus*. At the trial, the plaintiff proved a demand of 2*l.* 10*s.* The defendant then gave evidence in support of his set-off to

(a) Ante, p. 136.

an amount beyond the 2*l.* 10*s.* The plaintiff then proposed to shew that the sum so proved had been paid. Now, I think it was not competent for him to shew this payment, considering what was the issue on the pleadings. The issue raised on them was, whether or not the plaintiff ever was indebted to the defendant. If he ever was, the defendant was entitled to have the issue found in his favour. The fact of that debt having been paid was not an issue raised, and consequently evidence of it was inadmissible.

Now, to shew that the evidence was admissible, the case of *Shirley v. Jacobs* was cited. That was an action against the acceptor of a bill of exchange, to which the defendant pleaded that he did not accept. At the trial, the plaintiff was allowed to give evidence of part payment, to the amount of 1*l.* 15*s.*, and a verdict was found in favour of the plaintiff for the difference between that sum, and the amount of the bill. A motion was afterwards made to increase the verdict to the full amount of the bill. On that occasion Chief Justice *Tindal* said, "I take the meaning of the rule to be this, that payment cannot be given in evidence as an answer to the action, unless specially pleaded. In the present case, it was not so offered; but merely in reduction of damages. Whether the plea be the general issue or a special plea, the jury would have two points to inquire into—*first*, for whom, the issue was to be found; *secondly*, what damage the plaintiff had sustained. The damages the plaintiff, in this case, would be entitled to would be that portion of the bill which remained unpaid. As before the new rules, the defendant was always entitled to prove, under the general issue, payment (even after issue joined) in reduction of damages; so now I cannot see why any thing should be withheld from the jury that goes to reduce the amount of the verdict. It would be a very singular thing if, when a bill is put in, and the jury see indorsements of part payments on the back of it, they must still upon their oaths say

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that the full amount of the bill remains due to the plaintiff. In the case of judgment by default, and an assessment of damages before the sheriff, nobody doubts but that payment might be proved in order to reduce the verdict." It is argued by analogy to this case, that though the evidence of payment could not be given, so as to affect the verdict, yet that it might be given so as to reduce the amount of damages. That argument, however, does not hold. Because, in the case of a replication of *nunquam indebitatus* to a plea of set-off, the issue being merely, whether the plaintiff was ever indebted to the defendant; if it was proved, that he ever was indebted, the issue must be found for the defendant. In that case, there would be an end of the action, and nothing farther would be done upon the verdict. But in the case of an issue being found for the plaintiff, another inquiry still remains to be instituted—namely, as to the amount of damages to which the plaintiff is entitled. It would be necessary to inquire into that, whatever issue should be found for the plaintiff. But no such question can arise, where the verdict is found for the defendant; there being an end of the action. This state of things arises from the plaintiff adopting this form of plea, and raising such an issue on the pleadings. I must treat this case as if the new rules of pleading were not in existence, for they do not touch replications. Nothing is said throughout them concerning replications. The plaintiff has a right to reply *nil debet*, as before the new rules. I think, therefore, that the Secondary was quite right in rejecting the evidence of payment, as it was quite beside the issue.

If the amount in question had been large, perhaps it might have been worth while considering whether there should not be a new trial, so as to enable the plaintiff to amend his replication; but the amount being so small, I do not think it at all advisable that it should take place. The present rule must, therefore, be discharged.

Rule discharged.

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REX v. HESTER.

BUTT moved for a rule to shew cause why the conviction in this case should not be removed by *certiorari* into this Court from the *Oxfordshire Sessions*. It was a conviction under the 1 & 2 Will. 4, c. 32, s. 30, for being found on inclosed land in the day time in pursuit of game. The question was, whether such a summary conviction could be removed by *certiorari*, according to the provisions contained in the act of Parliament. By sect. 45 it was enacted, "that no summary conviction in pursuance of this act, or adjudication made on appeal therefrom, shall be quashed for want of form, or be removed by *certiorari* or otherwise into any of his Majesty's superior Courts of record." From the language of this section, it was clear, that the conviction could not be removed unless some change had been effected in the law by the provisions of the late act of Parliament, the 5 & 6 Will. 4, c. 20, s. 21.

A conviction under the 1 & 2 Will. 4, c. 32, s. 30, is still irremovable under sect. 45, notwithstanding the 5 & 6 Will. 4, c. 20, s. 21.

PATTESON, J.—In the case of *Rex v. Mellor (a)*, it was decided that the Court might look at a verified copy of the conviction in order to judge of the validity of the warrant, but that the conviction itself could not be removed.

Butt.—That would be the clear meaning of the act of Parliament, unless its provisions were affected by those contained in the recent act, to which he had referred. By sect. 37 of the 1 & 2 Will. 4, c. 32, it was provided, that the penalties, in such a case as the present, should "be paid to some one of the overseers of the poor, or to some other officer (as the convicting justice or justices may direct) of the parish, township, or place in which the

(a) Ante, Vol. 2, p. 173.

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offence shall have been committed." By sect. 21 of the 5 & 6 *Will.* 4, c. 20, it was provided, "that from and after the passing of this act, one moiety of all such penalties and forfeitures as are directed to be paid and applied as aforesaid, shall go and be paid to the person who shall inform and prosecute for the same, and the other moiety thereof only shall go and be paid to such overseer or officer as aforesaid, and be by him applied in the manner by the said last recited act directed; and the form of conviction set forth in the said last recited act shall, so far as relates to the distribution of the penalty for which judgment shall be given, be made according to the act, and conformably with the direction given by this act as to such distribution." In this latter act of Parliament, no provision was made for abolishing the writ of *certiorari*. The question then was, whether, as this change had been made in the application of the penalties, and a corresponding change in the form of the conviction, the present must not be considered as a conviction under the latter act; and as the *certiorari* was not taken away by that act, it must be regarded as removable into this Court.

PATTESON, J.—It is impossible to say that this is a conviction under the last act of Parliament. The only effect of its provisions was to alter the application of the penalties incurred under the previous act. The conviction, therefore, must still be regarded as being made under the former act. Now, by sect. 45 of the former, the conviction is declared to be irremovable by *certiorari* or otherwise. I cannot, therefore, grant the rule now prayed.

Rule refused.

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DOE *d.* GRIMES *v.* ROE.

R. V. RICHARDS moved for judgment against the casual ejector. The affidavit on which his application was founded, stated, that the deponent had gone to the premises mentioned in the declaration, and knocked at the door. The tenant in possession then came, but refused to open the door. The deponent gave an explanation of the object of the proceeding through the door. The tenant then went away, refusing to take the declaration. The deponent immediately afterwards served the son of the tenant in possession on the premises, he at that time residing with his mother there.

Service in ejectment.

PATTESON, J.—It does not follow that at the time the son was served the mother was on the premises. I think, however, you may take a rule to shew cause.

Rule *nisi* granted.

COWPER and Others *v.* JONES and Another, Bail of
STERNBERG.

MANSEL moved for a rule to shew cause why the plaintiffs should not be at liberty to sign judgment as for want of a plea. The plaintiffs sued by *sci. fa.* on a recognizance of bail, for the appearance of a person named *Sternberg*. The plaintiffs had declared, and the defendant *Jones* had pleaded the following plea:—"And the said *John Jones*, by *N. B.*, his attorney, says, that after becoming pledge and bail for the said *George Sternberg* for the purposes and in the manner in the said declaration mentioned, and after the obtaining of the said judgment against the said *George Sternberg*, and before the ac-

The mere fact of a plea being clearly insufficient in point of law, is not a ground for signing judgment as for want of a plea.

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cruing of the causes of action in the said declaration also mentioned, and before the commencement of this suit, the said *George Sternberg*, the original defendant, became bankrupt within the true intent and meaning of the statutes then in force concerning bankrupts, and that the said supposed causes of action in the said declaration mentioned, if any such there were, did accrue to the said bankrupt after the said *George Sternberg* so became a bankrupt as aforesaid; and this the said defendant is ready to verify."

In *Miley v. Walls* (a), the Court of *Exchequer* held, that where a defendant pleaded a plea, containing a number of facts, and calculated to perplex the plaintiff, the Court, on affidavit of its falsity, and no pretence being shewn for pleading it, ordered it to be set aside and plaintiff to sign judgment. The plea here pleaded was in general terms, and was not authorized by the Bankrupt Act, 6 *Geo.* 4, c. 16, s. 126, which gives such a plea only to the bankrupt. The plea did not allege or indeed import that the principal had obtained his certificate, and therefore could not by any construction amount on its face to a defence; and even if so construed, it was distinctly sworn that the principal had not obtained his certificate; and if he had, the matter of excuse was ground of motion only, and not of plea. The plea, therefore, was in form a nullity, and a mere trick in pleading.

PATTESON, J.—Unless the defendant was under terms of pleading issuably, or the plea pleaded raised a different issue, the Court cannot interfere. The plea may contain a statement of facts, which may or may not be true, and which are not sufficient in point of law as an answer to the action. That, however, is not a reason for setting it aside. I have not the power to do it. I know the Court

(a) Ante, Vol. 1, p. 648.

some years ago used to interfere where the plea was frivolous, and authorize the plaintiff to sign judgment as for want of a plea. But the Courts afterwards retraced their steps, on the ground of a doubt they had as to their power so to do. The Court, therefore, now never interferes, unless the defendant is under terms to plead issuable; or under some special circumstances. The mere insufficiency of a plea in point of law does not entitle the plaintiff to sign judgment as for want of a plea.

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Rule refused.

ARMSTRONG v. MARSHALL.

ERLE shewed cause against a rule for setting aside an award, on the ground of the arbitrator having refused to receive certain evidence, which was tendered on the part of the defendant. It appeared from the affidavits, that the action was brought by a surveyor against the owner of a coal-mine, for certain plans made of the mine for the latter. It also appeared, that an action of trespass had been brought by the defendant for certain trespasses alleged to have been committed by the owner of a neighbouring mine in the mine of the former. In order to shew that the trespass complained of had been committed, it became necessary that the present plaintiff should descend the shaft, and examine the extent of the mine, in order to make a plan for the use of the Court, on the trial of the action of trespass. The defendant accordingly descended, and made certain plans of the mine, but was prevented completing his survey, in consequence of the foul air, which had already caused the death of two of the men. When the trespass cause came on for trial, these plans were produced before the jury. A verdict was found for the defendant in that action. The defendant in the pre-

It is no ground for impeaching an award that the arbitrator has been mistaken in point of law as to the admissibility of certain evidence.

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sent action refused to pay for the plans so furnished by the present plaintiff, on the ground that they had been entirely useless for the purpose intended. The present action was then brought to recover the price of them. The cause was referred to a barrister, and the parties accordingly attended before him. On the part of the defendant, one of the special jurymen was called, for the purpose of shewing the opinion, which he and his brother jurors entertained of the accuracy or inaccuracy of the plans made by the plaintiff of the coal mine. The arbitrator refused to hear this evidence, so far as it related to his brother jurors. The present rule was obtained to set aside his award, on the ground of that refusal. In answer to the rule, *Erle* objected to the power of the Court to interfere, on the ground of the arbitrator being sole judge of law and fact. He cited *Ashton v. Poynter* (a), where it was held, that the decision of an arbitrator, though not a barrister, is final, although it can be clearly shewn that his award is founded on a misapprehension of law. Again, in *Jupp v. Grayson* (b), in which case it was decided, that where a mixed case of law and fact is referred to a non-legal arbitrator, and he decides absolutely upon it, without raising any question upon his award, his decision is final, and the Court will not entertain a motion for reviewing such decision, either as to the facts or the law. In those cases, the arbitrator was not a barrister, yet the Court would not interfere with his decision; *à fortiori*, the Court would not interfere with the decision of an arbitrator who was a barrister. He contended, that the arbitrator in the present case had acted correctly in not admitting the evidence.

Crowder was heard in support of the rule.

Cur. adv. vult.

(a) *Ante*, Vol. 3, p. 201. (b) *Id.* 199.

PATTESON, J.—I have examined the cases, and it appears to me that the arbitrator is the judge of law and fact, as to all matters presented to him on the arbitration. His decision, therefore, is final, and the Court will not interfere with it, unless the question of law is raised by the award. I discharge the rule, therefore, on that ground only; but extrajudicially, I may say, I should agree with the learned arbitrator in the opinion he has formed as to the inadmissibility of the evidence in question. The present rule must therefore be discharged.

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Rule discharged.

FOGARTY v. SMITH.

MANSEL applied under 1 R. H. 2 Will. 4, s. 190, and upon notice, for a rule to discharge a defendant, who had remained in execution for twelve successive calendar months, for a debt not exceeding 20*l*.

Where a defendant has remained in execution for twelve successive calendar months for a debt of 20*l*, and 1*s*. damages, in an action of debt, he is entitled to his discharge under the 48 Geo. 3, c. 123, s. 1.

R. Bayley shewed cause.—It appeared, from his affidavit, that the action in which the defendant had been taken in execution, was an action of debt in the Borough Court of *Plymouth*, and judgment was suffered by default. The amount of the debt was 20*l*., with 1*s*. for damages. The debt and damages, therefore, together, amounted to a sum exceeding 20*l*. The words of the act of Parliament were, “all persons in execution upon any judgment, in whatsoever Court the same may have been obtained, and whether such Court be or be not a Court of record, for any debt or damages not exceeding the sum of 20*l*., exclusive of the costs recovered by such judgment.” Consequently, where the amount of the judgment, whether for debt or damages, or debt and damages,

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amounted to more than 20*l.*, the defendant was not entitled to his discharge. He cited *Cooper v. Bliss* (a), where it was decided that a defendant is not entitled to his discharge under the present act of Parliament, where the debt for which he was in execution exceeded 20*l.*, although the excess consisted of interest only, which had accrued after action brought. There, at the time of bringing the action, which was on a promissory note, the principal and interest amounted to 18*l.* 6*s.* 6*d.* The case being referred to the Master on a rule to compute, he found that the principal and interest amounted to 21*l.* 6*d.* The Court then said, "the defendant is here in execution for debt and damages, which, by ordinary computation, at 5*l.* per cent., exceed 20*l.* According to the words of the act, therefore, the Court has no power to interfere." In the marginal note of *Doc v.* — (b), it is stated, that "a defendant remaining in execution twelve successive calendar months, for the nominal damages in ejectment, is entitled to his discharge under the 48 *Geo. 3*; c. 123, s. 1, although the property recovered in the action is of considerable value." Mr. Justice *Patteson*, in this last-mentioned case said, "the sum for which the party is in execution is that to which we are to look, according to the language of the act. Now, the defendant has been in custody for more than twelve months, for a sum less than 20*l.*, and therefore is entitled to her discharge under the statute." From these two cases it would appear, that the sum for which the defendant was in execution was that to which the Court must direct its attention, whether it consisted of debt only, or debt and damages together. Here the debt and damages together exceeded 20*l.*, and consequently, by the express language of the statute, the defendant was not entitled to his discharge. But if it

(a) Ante, Vol. 2, p. 749. (b) Ante, Vol. 1, p. 69.

should be contended that the words of the statute were to be construed distributively, then the case did not come within the statute at all, because he was not in execution either for debt *or* damages separately, but for debt *and* damages. In either way, therefore, the defendant was not entitled to be discharged.

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Mansel, in support of the rule, submitted that the case was clearly within the act of Parliament. It provided, that the sum for which the defendant was in execution should not exceed 20*l.*, exclusive of the costs recovered by such judgment. By the practice of the Court, the formal damages of one shilling in an action of debt were treated merely as costs, and merged in them. It was, therefore, not to be considered as damages within the meaning of the act of Parliament, but merely as costs, which, by the words of the statute itself, were not a ground of continuing the defendant in custody.

PATTESON, J.—In this case, it seems that there was a judgment by default in an action of debt. As a matter of course, the plaintiff's damages were assessed at 1*s.* I think, that when the act of Parliament speaks of "debt or damages," it means to distinguish between those cases where the action is substantially brought for the recovery of a debt, as in the action of debt or *assumpsit*; and those where the action is brought for the recovery of damages merely, as in an action of trespass. It is plain that the costs in both cases must be considered as out of the question. Now the act, when it speaks of *debt*, clearly means the debt substantially sought to be recovered. But the shilling damages in an action of debt is merely nominal, and is treated by the practice of the Court as costs, and allowed for on the taxation of costs. It does not appear, therefore, that it can be considered either as debt or

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damages, within the meaning of the act of Parliament. The present rule must, therefore, be granted.

Rule granted (a).

(a) It may perhaps be useful to state what are the requisites in order to obtain a defendant's discharge under the 48 Geo. 3, c. 123. First, there must be an affidavit by the defendant, stating that he has been in execution for twelve successive calendar months, for a debt not exceeding 20*l.*, and stating the amount, exclusive of costs. Next, there must be a copy of causes. If the defendant is in the custody of the Marshal or the Warden, the officer will take judicial notice of the handwriting of the Marshal or the Warden, or their respective deputies, who

have signed the copy of causes, or of their seals. If the defendant is in the custody of another gaoler than the Marshal or Warden, an affidavit verifying the gaoler's signature to the copy of causes must be obtained. Lastly, there must be an affidavit of service upon the plaintiff himself, and not upon his attorney. The service, however, need not be strictly personal as in the case of an attachment; but it may be, as in the case of an ordinary rule, at the plaintiff's residence, on some person having privity with him.

ORTON v. FRANCE.

The illness of a witness to whom a commissioner of the Court might be sent to take his affidavit, is no excuse for delay in making an application to rescind an order for setting aside a writ of summons on the ground of irregularity.

GURNEY moved for a rule to shew cause why a Judge's order for setting aside the writ of summons in this case for irregularity should not be rescinded. The order had been made on the 20th of *October* last; considerable delay had therefore existed on the part of the plaintiff in making the application. The reason of it was, that a witness whose affidavit was necessary to support the application had been very ill until the present time.

PATTESON, J.—I do not think that is a sufficient reason, as a commissioner might have been sent to him, in order to take his affidavit. The application is too late, therefore.

Rule refused.

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STANLEY v. PERRY.

R. C. SMITH moved for a rule to take out of Court a sum of money paid in by the sheriff, pursuant to a rule under the Interpleader Act, as the proceeds of an execution; and also for the payment of costs by the claimant on the goods, who had since abandoned his claim. It was submitted, that, as notice of this application had been given to the other side, the rule ought to be absolute in the first instance. *Scales v. Sargeson* (a) was cited. It was there held, that the claimant under such circumstances was liable to pay the costs of the motion, although no previous application had been made.

Where money, the proceeds of an execution, has been paid into Court by the sheriff, under the Interpleader Act, and the claimant abandons his claim, the rule for paying the money out of Court to the execution creditor, together with his costs, is *nisi* in the first instance.

PATTESON, J.—The rule must be *nisi*. The case of *Scales v. Sargeson* only decides that the party who makes the application is entitled to the costs of coming to the Court. The opposite party, however, has a right to be heard against the rule.

Rule *nisi* accordingly.

(a) Ante, Vol. 3, p. 707.

WEBB v. WEBB.

BUSBY moved for leave to sign judgment on an old warrant of attorney. All the necessary documents were in his possession, and the only peculiarity in the case was, that he had only an office copy of the affidavit of the due execution of the warrant of attorney, instead of the original. That, he conceived, was no objection to leave being granted.

Judgment may be obtained on an old warrant of attorney, although only an office copy of the affidavit of its due execution is produced.

PATTESON, J. (after consulting with the clerk of the rules, Mr. HILL.)—That will be sufficient, according to the practice of the Court.

Rule granted.

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KRELL *v.* JOY.

In order to obtain judgment on an old warrant of attorney, it is sufficient if the affidavit states that the defendant was "seen alive within ten days."

GREAVES moved for leave to sign judgment on an old warrant of attorney. His affidavit stated the defendant to have been "seen alive within ten days." He cited *Watts v. Bury* (a), where the Court allowed judgment to be entered up, on an old warrant of attorney, on the 17th of *May*, although the defendant had not been seen alive since the 23rd of *April* previous.

PATTESON, J.—That is sufficient.

Rule granted.

(a) Ante, p. 44.

CURTIS and Wife *v.* TABRAM.

The lapse of eight years between the joining of issue and the application for judgment as in case of a nonsuit, is no ground for discharging the rule.

W. H. WATSON shewed cause against a rule *nisi* obtained by *Austin* for judgment as in case of a nonsuit. The affidavit, on which the rule had been obtained, stated, that issue had been joined in *Hilary* Term, 1828. The application, he contended, was too late. The object of the 14 *Geo. 2*, c. 17, which empowered the Courts to give a defendant the like judgment as in case of a nonsuit, was to prevent defendants from being harassed by the continued pendency of a suit. This was for the benefit of the defendant. But if he thought proper to allow so long a period as eight years to pass without applying to the Court, he was guilty of such laches as disentitled him to the benefit of the statute. Under these circumstances, the present rule ought to be discharged. The rule must, at all events, be discharged on the plaintiff's giving the usual peremptory undertaking, as the plaintiff had an affidavit of the absence of a material witness. This was conceded on the other side.

Austin, in support of the rule, contended, that the application was in time. The right of the defendant to judgment as in case of a nonsuit depended on the words of the 14 *Geo. 2*, c. 17; and they must be considered as peremptory on the Court to allow the defendant to sign judgment whenever the plaintiff, after issue joined, had not proceeded to trial according to the course and practice of the Court. Lapse of time merely could not affect the right of the defendant. The argument on the other side was calculated to prove that the greater the neglect of the plaintiff to proceed to trial, the less liable he became to suffer judgment as in case of a nonsuit. If he neglected to proceed within two terms, it was admitted that he would be liable to have such a judgment signed against him; but if he neglected to do so for two-and-thirty, his liability ceased. But the mere lapse of time was not sufficient to deprive the defendant of his right to judgment as in case of a nonsuit. In *Doe d. Phillips and Others v. Moses* (a), issue was joined in *Trinity* Term, 1792, and the rule for judgment as in case of a nonsuit was not applied for till *Trinity* Term, 1794, and the Court there did not consider the lapse of two years any objection to the motion. In *Manby v. Wortley* (b), issue was joined in *Trinity* Term, 1775, and the motion for judgment as in case of a nonsuit was not made until *Michaelmas* Term, 1778. In that case also no objection was made on the ground of lapse of time. In both cases the length of time passed *sub silentio*, and was not urged as a reason for refusing the rule.

PATTESON, J.—I will look into the authorities, and give my opinion in a few days.

Cur. adv. vult.

(a) 5 T. R. 634.

(b) 2 W. Bl. 1223.

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PATTESON, J.—I have examined the authorities on this point, but can find no case in which so long a time, as in the present instance, has elapsed between the joining issue and the application for judgment as in case of a nonsuit. Nor can I find any case in which the length of time has been made an objection to the rule. In the two cases mentioned in argument, the lapse of two years, and of more than three, appears not to have formed any ground of objection to the rule. That being the case, I do not see how the lapse of eight years can be considered sufficient to deprive the defendant of his right to obtain judgment as in case of a nonsuit. The present rule may, therefore, be discharged, on the plaintiff's giving a peremptory undertaking.

Rule discharged, on a peremptory undertaking.

Austin moved, on a subsequent day in the term, for the costs of the day, if any had been incurred.

PATTESON, J., after some consideration, granted him the rule for that purpose, observing, that the Master would determine, on taxation, what costs ought properly to be allowed.

Rule accordingly.

DOE *d.* ERRINGTON *v.* ERRINGTON.

Where the declaration in ejectment, containing only one count and one demise, claimed several messuages, and the jury found a verdict of *guilty* as to some, and *not guilty* as to another, the Court held, that, pursuant to 1 *Reg. Gen. Hilary Term 2 Will. 4*, s. 74, the defendant was entitled to his costs as to the messuage with respect to which the plaintiff had failed, and to have them set-off against those of the lessor of the plaintiff.

C. CRESSWELL and *C. Clarke* shewed cause against a rule *nisi* obtained by *R. Alexander* and *W. H. Watson*, for taxing the defendant his costs in an action of ejectment, as to certain messuages stated in the declaration,

and the jury found a verdict of *guilty* as to some, and *not guilty* as to another, the Court held, that, pursuant to 1 *Reg. Gen. Hilary Term 2 Will. 4*, s. 74, the defendant was entitled to his costs as to the messuage with respect to which the plaintiff had failed, and to have them set-off against those of the lessor of the plaintiff.

with respect to which the plaintiff had failed; and for setting those costs off against those of the lessor of the plaintiff.

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 d.
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 v.
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R. Alexander and *W. H. Watson* were heard in support of the rule.

Cur. adv. vult.

COLERIDGE, J.—This was a rule calling upon the lessor of the plaintiff to shew cause why the Master should not tax the defendant his costs, and why they should not be set off against those of the lessor of the plaintiff.

The action had been brought to try the validity of a will, by the heir-at-law against the devisee. There was only one count, and one demise; but the lands sought to be recovered, as appeared by the particulars of demand, and on the evidence, fell under three different descriptions—one part was freehold, of which the testator had died seised; one part copyhold, to which the devisee had not been admitted, and the remainder freehold contracted for by the testator, but not conveyed to him. The jury established the will, but as the devisee had not been admitted to the copyhold, the heir-at-law recovered for that portion. The verdict was entered, “the defendant guilty, as to two messuages; as to the residue, not guilty.”

This application was rested upon the rule *Hilary Term 2 Will. 4, reg. 1, s. 74 (a)*, which not only deprives the plaintiff of costs upon any issues on which he has not succeeded, but also provides that the costs of all issues found for the defendant shall be deducted from the plaintiff’s costs.

In construing the word “issues” in that rule, the Court of *Exchequer*, in *Cox v. Thomason (b)*, and the Court of *C. P.* in *Knight v. Brown (c)*, have decided, that where

(a) Ante, Vol. 1, p. 193.

(b) Ante, Id. p. 572.

(c) Ante, Id. p. 730.

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the single plea of *not guilty*, or *non assumpsit*, has been pleaded to any number of counts, it raises as many distinct issues as there are counts, the single plea being treated as divisible, and substantially pleaded to each count by itself. And in *Prudhomme v. Fraser* (a), an action upon the case for a libel, the Court of *King's Bench*, adopting the principle of the two former decisions, decided that a single count might be divisible, according to the several allegations, containing each a several cause of action, so that the general issue, pleaded singly to the whole, might be considered to raise a number of distinct issues, equal to the number of such allegations; and therefore, where the jury had found that a small portion only of a long alleged libel was intended to apply to the plaintiff, the Court declared, that upon taxation the plaintiff would be entitled only to the costs arising out of that portion, and the defendant to the costs arising out of the other parts of the declaration.

In these decisions the Courts have manifested a determination to give the fullest practicable effect to the rule in question, a rule founded in strict justice. The case last cited is a direct authority for the present application, unless some distinction is to be made between the action of ejectment and the actions in other forms. The action of ejectment in form complains of an unlawful ouster, usually from several messuages or closes, and the plea of not guilty puts in issue an ouster from any one of them. The issue, therefore, is formally and substantially divisible. It is very possible, that as to one or two messuages the ouster may be unlawful, and as to the residue lawful, and there is nothing to prevent a finding by the jury of such an ouster as to some or one of the messuages or closes, and negating it as to the residue. In the Appendix to the 9th ed. of *Tidd's Practice*, will be found

(a) 4 N. & M. 512.

the precedent of a *postea* in a case in which the jury have found in part for the plaintiff, and in part for the defendant; and in page 648, the precedent of the judgment following upon such a finding and *postea*.

Looking at these precedents and upon principle, there appears no distinction between ejectment and other actions, of a nature to prevent the application of the same principle as to the taxation of costs under this rule. And as it is very desirable to avoid the multiplying differences in practice, I am of opinion that the same rule should prevail here as was laid down in the case of *Prudhomme v. Fraser*; and consequently that this rule should be made absolute.

Rule absolute.

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OSTLER v. BOWER.

THIS was a sheriff's rule under 1 & 2 Will. 4, c. 58, s. 6, (the Interpleader Act), calling on the execution creditor and claimant of certain goods seized by the sheriff, under a writ of *fi. fa.*, to appear before the Court, and abide such order as it should think fit to make.

On shewing cause against the rule, it appeared, from the affidavits, that the under-sheriff was the plaintiff in the action, although the sheriff himself made an affidavit denying collusion with either party.

If the under-sheriff is the execution creditor, or partner in business of the execution creditor, the sheriff is not entitled to relief under the Interpleader Act.

PATTESON, J., expressed a doubt as to whether this case came within the meaning of the act of Parliament. He therefore took time to consider whether this was such a case as entitled the sheriff to relief.

Cur. adv. vult.

PATTESON J.—I have considered this case, and I cannot find any instance in which the Court has interfered

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to relieve the sheriff, where the under-sheriff was himself the plaintiff. Although the sheriff himself may swear that he does not collude with the plaintiff, yet he must be considered as indemnified in the present case, and therefore not entitled to obtain relief under the Interpleader Act. The sheriff is not obliged to accept an indemnity; but if he does accept one, the Court will not relieve him. If the sheriff does not think proper to fulfil his own office, but employs his under-sheriff, and any thing is done wrong by him or his officers, he has his remedy against them. I think, therefore, that the present rule must be discharged, with costs.

It subsequently appeared, on further inquiry, that the under-sheriff was not the plaintiff, although he bore the same name, but that he was the son and partner of the plaintiff, who was an attorney.

PATTESON, J., then referred to the case of *Duddin v. Long* (a), where the Court of *Common Pleas* had refused to interfere and relieve the sheriff, under circumstances not so strong as the present. There, it appeared that the under-sheriff was in partnership with a solicitor at *Salisbury*, and that when a writ of execution of the plaintiff against the defendant was sent down to them to be executed, the plaintiff's agent was induced by the firm not to have it executed for a week, and, in the course of the time thus gained, other creditors of the defendant were prompted to issue a fiat of bankruptcy against him, to which the under-sheriff's partner was solicitor. The Court there said, "The sheriff ought to have no interest on either side, and in the present case he would not be considered to be without bias." The present is a much stronger case. I do not think, therefore, that the sheriff

(a) Ante, Vol. 3, p. 132.

is entitled to relief under the statute. The present rule must therefore be discharged, but without costs.

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Rule discharged, without costs.

J. Hildyard appeared for the sheriff.

N. Clarke for the execution creditor.

Wightman for the claimant.

Butt for certain trustees claiming an interest in the property seized.

REX v. FELLOWES and Others.

W. H. WATSON applied for a writ of *certiorari* to remove an indictment for an assault from the sessions. It was an indictment against a magistrate of a county and his two sons, for an assault upon the prosecutor. The indictment would be tried before the bench of magistrates, of which the first defendant was a member. Great prejudice, therefore, against the prosecutor was necessarily anticipated. By the late enactment of the 5 & 6 Will. 4, c. 33, s. 1, it was required that some reason for the application must be stated. The prejudice on the part of the bench, it was submitted, was a sufficient reason for granting the application.

The mere fact of a defendant, on an indictment for an assault, being a member of the bench of magistrates who are to try it, is not a sufficient ground, within the 5 & 6 Will. 4, c. 33, s. 1, for removing the indictment by *certiorari*.

Cur. adv. vult.

PATTESON, J.—I am of opinion, that the writ of *certiorari* ought not to be granted from the mere circumstance of one of the defendants being a magistrate. No difficult question of law can arise, nor is any suggested. The only inquiry is, as to matter of fact; and I cannot imagine that the bench will not fairly try such a question.

Rule refused.

1836.

HARRIS v. MATHEWS.

The Court cannot entertain an objection patent on a proceeding attached to the affidavit bringing that objection before the Court, if, from wrong intitling, the affidavit cannot be read.

Where a rule is discharged on a preliminary objection to the title of the affidavit supporting the rule obtained for setting aside proceedings on the ground of irregularity, the Court has discretion as to the costs of the application.

SIR F. POLLOCK shewed cause against a rule *nisi* obtained by *Dowling* for setting aside the replication and all subsequent proceedings on the ground of irregularity. The supposed irregularity was, that a date had not been put to the replication pursuant to the rule of *H. T. 4 Will. 4 (a)*, the words of which were, "every pleading, as well as the declaration, shall be intituled of the day of the month and year when the same was pleaded, and shall bear no other time or date." He should, however, take a preliminary objection to the application, which was, that the affidavit on which the motion was made, was not intituled in the cause; the Christian names mentioned in the affidavit of the defendant as those of the plaintiff were different from those of the plaintiff in the cause. The Court, therefore, could not look at the affidavit; consequently, the rule must be discharged.

Dowling, in support of the rule, contended that the objection taken could not be sustained. The rule was drawn up on reading the affidavit in question, as well as the paper writing thereunto annexed. That paper writing was the issue in the cause. The Court might therefore see, by merely looking at those proceedings, that the irregularity complained of had been committed. There was no necessity, therefore, for having recourse to the affidavit at all; and sufficient materials were before the Court on which to determine the merits of this application, quite independently of the preliminary objection.

LITLEDAL, J.—Without an affidavit, there is nothing to bring the objection to the pleading before the Court.

(a) Ante, Vol. 2, p. 232.

This does not appear to be an application in the cause. The present rule must therefore be discharged.

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Sir *F. Pollock* contended, that it ought to be discharged with costs, it having been moved with costs.

Dowling contended, that there was no irrefragable rule on the subject. This rule was not discharged for irregularity, but on a preliminary objection taken antecedent to the question of irregularity being discussed. If the question of irregularity had been argued, it might perhaps have been different. The Court, therefore, had a discretion. The question was, whether it would, upon such an objection, visit the defendant with the costs of the application.

LITTLEDALE, J., (after consulting with Mr. *Hill*, of the *Rule Office*), was of opinion that he had a discretion as to the costs, and accordingly directed that the rule should be discharged, but without costs.

Rule discharged, without costs.

DOE *d.* JACKSON *v.* ROE.

HELPS moved for judgment against the casual ejector. The affidavit on which he moved, stated the person served to be the "occupier" of the premises, but not the tenant in possession.

The affidavit in support of an application for judgment against the casual ejector must swear to a service on the "tenant in possession," the word "occupier" not being sufficient.

PATTESON, J.—We always require the words "tenant in possession," as much as in an affidavit of merits we require the words "on the merits." The affidavit is at present insufficient.

Rule refused.

1886.

JERVIS v. JONES.

If a defendant taking the benefit of the Insolvent Act, the 7 Geo. 4, c. 57, inserts in his schedule the purchase-money of an annuity, as well as the annual amount of the latter, he will be discharged as to the arrears of that annuity due at the time of making out the schedule, although they have been omitted, if such omission did not arise from an intention to mislead.

It is a sufficient compliance with 1 R. G. H. T. 2 Will. 4, s. 5, as to a deponent's residence, to describe himself as having been arrested, and to be a prisoner in the sheriff's custody.

WORDSWORTH shewed cause against a rule obtained by *Hoggins* for the discharge of a defendant out of custody on the ground of his person being freed from arrest, in consequence of his taking the benefit of the Insolvent Act, the 7 Geo. 4, c. 57. As a preliminary objection, he contended that the defendant's affidavit could not be read, his place of abode not being described pursuant to 1 Reg. Gen. H. T. 2 Will. 4, s. 5, which requires that "the addition of every person making an affidavit shall be inserted therein." He cited *Lawson v. Case* (a), wherein it was decided that an affidavit made by a defendant in a cause cannot be read unless his addition is inserted. He also cited the old rule *Michaelsmas Term 15 Car. 2*, K. B., *Collins v. Goodyer* (b); together with Mr. Dowling's note to *Lawson v. Case*; and contended that the rule 1 *Hilary Term 2 Will. 4*, s. 5, was merely cumulative; and did not supersede the practice clearly laid down by the old rule above referred to.

Hoggins, contra, cited *Jackson v. Chard* (c), where the Court decided that, where a defendant makes an affidavit in the cause, his addition need not be given. This was in confirmation of a previous case of *Poole v. Pembrey* (d). He also cited *Sharpe v. Johnson* (e), where the Court of *Common Pleas* held that a prisoner in the custody of the Warden of the *Fleet* need not state his residence in an affidavit made by him in the cause.

Wordsworth distinguished the last cited case from the

(a) Ante, Vol. 2, p. 40.

(b) 2 B. & C. 563; 4 D. & R. 44.

(c) Ante, Vol. 2, p. 469.

(d) Ante, Vol. 1, p. 693.

(e) Ante, p. 324.

present, because there the defendant was in the custody of the keeper of the Court's own prison; whereas, in the present case, he was in the custody of the sheriff. In that case, the Court could take judicial notice of the place of the defendant's confinement, because he was in effect on the floor of the Court; but no judicial notice could be taken of his place of custody when he was in the hands of the sheriff. Besides, the object of the defendant's addition was to apprise the plaintiff of the usual residence, &c., of the defendant, so that the former might communicate with him after his discharge out of custody.

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PATTERSON, J.—I think the defendant is sufficiently described. He states himself, in his affidavit, to have been arrested by the sheriff, and to be still in his custody. That, I think, is a sufficient compliance with the rule of Court, because he gives all the information wanted. What might be the decision on the question of the necessity of giving the addition merely on the ground of the defendant being the deponent, I do not now decide.

Wordsworth then objected that the application was too late. Five days had elapsed since the defendant was arrested. He cited *Hinton v. Stevens* (a), where four days were held to be the time within which an application must be made to set aside proceedings for irregularity.

Hoggins submitted, that, as in that case the action had been commenced by serviceable process, it was not an authority, for here the defendant was in custody upon a *capias ad satisfaciendum*.

PATTERSON, J.—Where a party is in custody, I think five days is a reasonable time within which to make an

(a) Ante, p. 283.

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application to the Court. The objection as to the four days' time applies to serviceable process only.

Wordsworth then proceeded to shew cause on the merits. The question in the case was, whether the defendant was discharged from his liability to an annuity by obtaining relief under the Insolvent Debtors Act, the 7 Geo. 4, c. 57, s. 46. The words of that section were, "That after such examination made into the matters of the petition and schedule of any such prisoner as hereinbefore directed, it shall and may be lawful at such hearing or adjourned hearing as aforesaid, for the said Court, or commissioner, or justices, upon such prisoner swearing to the truth of his or her petition or schedule, and executing such warrant of attorney as is hereinafter directed, to adjudge that such prisoner shall be discharged from custody and entitled to the benefit of this act, at such time as the said Court, or commissioner or justices shall direct, in pursuance of the provisions hereinafter contained in that behalf, as to the several debts and sums of money due or claimed to be due at the time of filing such prisoner's petition from such prisoner to the several persons named in his or her schedule as creditors, or claiming to be creditors for the same respectively, or for which such persons shall have given credit to such prisoner before the time of filing such petition, and which were not then payable, and as to the claims of all other persons not known to such prisoner at the time of such adjudication, who may be indorsees or holders of any negotiable security set forth in such schedule so sworn to as aforesaid." In the present case, the defendant had granted an annuity of 100*l.* *per annum* for a sum of 1000*l.* At the time of claiming the benefit of the act, the arrears of the annuity amounted to 475*l.* These arrears were not mentioned in his schedule, although the amount of the purchase-money, and of the annuity granted in consequence, was.

Extract from the Schedule.

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Creditor.	Amount.	Date when contracted.	Admitted or disputed, &c.
<i>Major Wm. Davis Jervis, Hinckley, Leicestershire, &c.</i>	1000 <i>l.</i>	1827	As a liability to this creditor, should he not be able to claim the same on an estate which I sold to the trustees of Mrs. <i>Weddell, of Gosport</i> , in 1828, on my having granted an annuity to this creditor of 100 <i>l.</i> per annum for the advance of 1000 <i>l.</i> in 1827.

For the arrears of 475*l.* the defendant had now been arrested. It was contended, that as they had not been mentioned in the schedule, the discharge under the Insolvent Act did not protect his person from liability to arrest for them. It might, perhaps, be said, that under sect. 51 of the act, the plaintiff might have come in and proved the amount of the arrears. But that section, although it referred "to any sum or sums of money which shall be payable by way of annuity or otherwise at any future time or times by virtue of any bond, covenant, or other securities of any nature whatsoever," could be held to apply to future liabilities only, and not to relieve the defendant from claims already incurred.

Hoggins contended that a sufficient description of the debt had been given in the schedule by stating the amount of the purchase-money of the annuity, as well as of the annuity itself. The purchase-money having been mentioned, it was quite clear that the discharge freed his person from arrest in respect of that sum. His person being freed from that which was the foundation of the arrears, it must also be freed from the arrears themselves; for

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then nothing remained to support them. If any arrears did exist, sufficient notice had been given to the plaintiff to come in and have his claim calculated. Such a notice having been given, and the attention of the plaintiff thus drawn to the claim in respect of which the defendant sought to take the benefit of the act, the present rule ought to be made absolute for the discharge of the defendant out of custody.

PATTESON, J.—At the time that the defendant sought to take the benefit of the act, he owed two absolute debts and one conditional debt. The two absolute debts were the purchase-money and the arrears of the annuity; the conditional debt was the future claims which the plaintiff might have in respect of the annuity. The former of the absolute debts and the conditional debt he introduced into his schedule. From these, therefore, he was freed by sects. 47 and 51. The question then is, as to the second absolute debt. In order to determine this, it is necessary to look at the language of sect. 40, which describes the requisites of the schedule which the insolvent is to make out. That section directs that the schedule shall contain “a full and true description of all debts due or growing due from such prisoner at the time of filing such petition, and of all and every person and persons to whom such prisoner shall be indebted, or who to his or her knowledge or belief shall claim to be his or her creditors, together with the nature and amount of such debts and claims respectively.” And sect. 46 directs the defendant to be discharged “as to the several debts and sums of money due or claimed to be due at the time of filing such prisoner’s petition from such prisoner to the several *persons named* in his or her schedule as creditors.” The words of this section, it will be observed, differ from those of the 1 *Geo. 4*, c. 119, s. 16. By that section the Court is empowered to determine in respect of what debts the de-

fendant is to be discharged; whereas, by the 46th section of the present act, the discharge is to be in respect of the several debts due or to become due to the several persons "named" in the schedule. Now, under these general words, it appears to me that the arrears of this annuity would be included; because it is a debt due to a person named in the schedule as a creditor. But it may be said, that as there were here two debts, they must be considered as if they were due to two different persons. If they had been different debts due to different persons, there might have been some weight in the objection. But as the original sum in respect of which the arrears became due was mentioned in the schedule, the attention of the creditor must necessarily have been drawn to the consideration of the arrears which might at that time have been due. There is nothing in the act of Parliament which could preclude the plaintiff, after having received such notice, from coming in and proving as a debt, both the arrears and the value of the future annuity; and as it does not appear that there was any intention to mislead the plaintiff, because his attention was directly called to the subject, I think the defendant is entitled to his discharge. That the intention to mislead is an important ingredient in the consideration of such a question as the present, is clear from the case of *Forman and Another v. Drew* (a). In that case, which was an application similar to the present, there was a difference of 2s. 6d. between the sum mentioned in the schedule as the plaintiff's debt and the real amount claimed. There Lord *Tenterden* said, "there being no evidence to shew that the defendant had any intention to mislead his creditors; and the mode in which the debt is described in the schedule being calculated to notify to the plaintiffs that the defendant sought to be discharged in respect of their debt, I

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(a) 6 D. & R. 75; 4 B. & C. 15.

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think that the provisions of the act of Parliament have been complied with, and that the defendant was duly discharged as to that debt." The principle as to misleading is applicable to the present case. The sum of 1000*l.* having been put down in the schedule, and these arrears depending upon it, the omission of them could not have arisen from a desire to mislead the creditor. As, therefore, it does not appear that the defendant had any intention to mislead the creditor, I think he is entitled to his discharge. I cannot give him the costs of this rule, because he has himself led to this discussion.

Rule absolute, without costs.

CROAD v. HARRIS.

It is no ground of objection to an issue being tried before the sheriff, that the defendant will endeavour to avail himself of the Gloucester Court of Requests Act.

R. v. RICHARDS shewed cause against a rule obtained by *Whitmore* for a writ of trial for the purpose of trying the issues joined between the parties in the present case. The demand was under 20*l.*, and the *venue* was the city and county of the city of *Gloucester*. That place, it appeared, had a Court of Requests established by 1 *W. & M.*, in the year 1689. Within that jurisdiction the defendant resided, and was liable to be summoned there. As it did not appear clearly that the defendant would be enabled to avail himself of the provisions of the Court of Requests Act in question if the cause were tried before the sheriff, an objection was made to the issuing of the writ of trial. The words of the act in question were, "if any person or persons shall at any time next after the 1st day of *August*, in the year of our Lord, 1689, commence and prosecute any action in any of his Majesty's Courts at *Westminster*, or in any other Court against any person inhabiting or residing within the city and county of the city of *Bristol*, and the city and county of the city

of *Gloucester*, and places before mentioned, for any debt or sum of money due upon contract, promise, specialty, or otherwise, which upon the *trial* shall be found not to amount to the full sum or value of 40*s.* over and above costs, no judgment shall be entered upon record of any such verdict; and if judgment shall be entered thereon, then such judgment shall and is hereby declared null and void; and, also, the defendant in every such action shall have his costs in the said suit, to be taxed by the said Court or their proper officer where such action shall be tried, and paid him by such plaintiff in the said cause: any law or custom to the contrary in anywise notwithstanding." The question was, whether a trial before the sheriff was such a *trial* as was contemplated by the Court of Requests Act referred to. When an application was made to Mr. Justice *Williams* for a writ of trial in this case, he feeling some doubt upon the subject, an application to the Court was directed.

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Whitmore, in support of the rule, contended that a trial before the sheriff was a trial within the meaning of the act in question. He cited *Bond v. Bailey (a)*, where the Court of *Exchequer* held, that the defendant was entitled to have a suggestion entered under the *London* Court of Requests Act, though the cause was tried before the sheriff. In the case of *Oates v. Shaw*, not yet reported, in the same Court, their Lordships were of a similar opinion.

PATTESON, J.—This question turns entirely on the meaning of the word "trial" in the statute, and whether it extends to a trial before the sheriff. The recent act 3 & 4 *Will.* 4, c. 42, ss. 17, 18, giving the trial before the sheriff, contains no restrictive words. Now, on that act the Court have already put a construction, that a default

(a) Ante, Vol. 3, p. 808.

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in proceeding to trial before the sheriff, is a default within the statute 14 *Geo. 2*, c. 17, and will entitle the defendant to move for judgment as in case of a nonsuit. It was formerly contended, that, to entitle a defendant to judgment as in case of a nonsuit, there must be a default in not proceeding to trial according to the course and practice of trials at the time of the passing of 14 *Geo. 2*, c. 17; but the Court thought otherwise, and that a default in not trying before the sheriff was a neglect within that statute. So here, the word "trial" in this statute will, I have no doubt, extend to a trial before the sheriff. I think I might have had some doubt on the subject, as the case has been already before my Brother *Williams*, who was of a different opinion; but the cases referred to, which were not then cited, decide the question.

Rule absolute.



GILSON v. CARR.

Affidavits to shew cause against an enlarged rule must be filed a week before the term to which it is enlarged.

The 17th section of the Uniformity of Process Act, as to attornies declaring whether writs have been sued out in their names, applies both to serviceable and billable process.

WORDSWORTH appeared in support of an enlarged rule, against which *Thomas* was to shew cause. The latter endeavoured to make use of certain affidavits, which had not been filed seven days before the term, pursuant to *R. M. 36 Geo. 3*. To this *Wordsworth* objected, on the ground of non-compliance with that rule.

Thomas insisted that the rule was not strictly imperative.

Wordsworth cited *Turner v. Unwin* (a). The marginal note of which was, "Affidavits in answer to a rule enlarged from one term to another, which requires the affidavits to be filed a certain time before the term, must in all cases, notwithstanding a contrary practice has pre-

(a) Ante, p. 16.

vailed, be filed within the time prescribed, unless the party is prevented filing them by *inevitable accident*." In this case there was no pretence for saying that the affidavits might not have been filed in due time.

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PATTESON, J.—In the case of *Turner v. Unwin*, which was a decision of the full Court, Lord *Denman* says, "We think it is better to adhere to the strict words of the rule, (*R. M. 36 Geo. 3*), and to determine that the affidavits which have not been filed in due time cannot be used, except in the case provided for by the rule itself. We have had several applications of this sort during this term; much time is consumed in discussing such questions; and though a contrary practice has existed, we have determined for the future to adhere strictly to the rule." After this decision I cannot permit the affidavits to be used.

Thomas then proceeded to shew cause on the affidavits in support of the rule. It appeared from them, that the plaintiff in the action had employed a person who was not an attorney to proceed for him, and that person had sued out a writ of summons, and made use of the name of an attorney named *Fry* on it, and instead of indorsing the residence of *Fry*, he had indorsed his own. Inquiries, it appeared, had been made of *Fry*, as to whether the writ had been issued by his authority or privity. *Fry* denied knowing any thing about the proceeding. The present rule was then obtained, either to stay proceedings, or to set aside the writ. The ground of the first branch of the application was, that the writ had not been sued out by the authority or with the privity of the attorney; and of the second, that the attorney's place of residence was not indorsed on the writ.

Wordsworth, in support of the rule, cited the 17th sect. of the Uniformity of Process Act, as creating the first

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irregularity; and the 12th section of the same statute as supporting the second objection. Under that section every writ is required to be indorsed with the name and *place of abode* of the attorney actually suing out the same.

PATTESON, J.—It is not quite clear that section 17 of the Uniformity of Process Act, (2 *Will.* 4, c. 39), applies to serviceable process. The words of that section are, “that every attorney whose name shall be indorsed on any writ issued by authority of this act, shall declare forthwith, whether such writ has been issued by or with his authority or privity; and if he shall answer in the affirmative, then he shall also, in case the Court, or any Judge of the same or any other Court, shall so order and direct, declare in writing, within a time to be allowed by such Court or Judge, the profession, occupation, or quality, and the place of abode of the plaintiff, on pain of being guilty of a contempt of the Court from which such writ shall appear to have been issued; and if such attorney shall declare that the writ was not issued by him, or with his authority or privity, the said Court, or any Judge of either of the said Courts, shall and may, if it shall appear reasonable so to do, make an order for the immediate discharge of any defendant or defendants, who may have been arrested on any such writ, on entering a common appearance.” From the language of that section, in speaking of the discharge of a defendant who had been arrested, it would appear only to apply to the writ of *capias*.

Wordsworth then called the attention of his Lordship to the language of 14 *Reg. Gen. M. T.* 3 *Will.* 4 (a), the words of which were, “that if any attorney shall, as required by the said act, declare that any writ of summons,

or writ of *capias*, upon which his name is indorsed, was not issued by him, or with his authority or privity, all proceedings upon the same shall be stayed, until further order."

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PATTESON, J.—I think that rule may be considered as an interpretation by the Court of the meaning of the statute. From that interpretation it may be considered that the act applies to serviceable as well as bailable process. I think the present rule must be made absolute for staying proceedings, and with costs. The plaintiff has thought proper to employ a person not an attorney, and the irregularities complained of are the result of his own improper conduct. If he will think proper to act in that manner, he must take the consequences.

Rule absolute, with costs.

SMITH v. EDWARDS.

BIGGS ANDREWS and *Harrison* shewed cause against a rule *nisi*, for delivering the *postea* in this cause to the plaintiff, and taxing him his costs.

Kelly and *Gunning* supported the rule.

Cur. adv. vult.

COLERIDGE, J.—This was a rule calling on the defendant to shew cause why the *postea* should not be delivered to the plaintiff, and why the Master should not tax him his costs.

It was an action of trespass, for breaking and entering

In an action *qu. cl. fr.*, the plaintiff obtaining less than 40s. damages, the plea of not guilty, since the new rules of pleading, being a special plea, takes the case out of the 22 & 23 Car. 2, c. 9, s. 136; but the Judge may, notwithstanding, grant his certificate under the 43 Eliz. c. 6, s. 2, to deprive the plaintiff of costs, the whole record and evi-

dence at the trial being properly taken into consideration.

If a plaintiff succeeds and recovers damages only as to part of his cause of action, he is still entitled to the *postea*.

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the plaintiff's close, and carrying away his goods.—The pleas were, *first*, not guilty; and, *second*, as to the asportation, that the goods were not the property of the plaintiff. The verdict passed in this form—"for the plaintiff, as to the breaking the close, with 5*s.* damages; and for the defendant, as to the goods." The Judge certified the amount of damages, as under the statute 48 *Elix.* c. 6, s. 2.

The first issue in this case was clearly a divisible one; and upon this finding, it must be taken that the jury have found for the defendant so much of it as relates to the asportation. It will stand, therefore, simply as an action of trespass *qu. cl. fr.*, with a plea admitting the plaintiff's possession and right of possession, and denying only the commission of the trespass alleged in the place named (*a*).

On this state of things, it was contended for the plaintiff, that the action was within the exemption from the statute of *Elizabeth*, which made the judge's certificate inoperative; and that no certificate was necessary under 22 & 23 *Car.* 2, c. 9, s. 136, to give costs, because it was an established rule, that whenever a defendant to a declaration in trespass pleaded any special plea, of whatever nature or disclosing whatever facts, the issue upon which was found against him, the plaintiff was entitled to full costs, although the damages were under 40*s.*; upon the principle that it then appeared that the judge *could* not in any view of the case grant the certificate, or that a certificate would be superfluous, and therefore the case was without the operation of the statute. For this latter point was cited the case of *Wright v. Piggin* (*b*), which, with many other decisions, fully bears out the position. Then it was said, that, by the operation of the new rule of pleading, the plea of not guilty had become a special

(*a*) See Reg. Gen. H. T. 4 *Will.* p. 325.
4, tit. Trespass, s. 2, ante, Vol. 2, (*b*) 2 Y. & J. 544.

plea, the effect of which was to put all question upon the title to the land out of the cause ; and, therefore, to put the case out of the statute within the principle above laid down.

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I was, and am unable to discover any distinction in principle as regards the statute of *Charles*, between the modern plea of *Not Guilty* and any other special plea. But the consequence of admitting this argument for the plaintiff to be correct in its entirety, would be to make a dead letter of both statutes in regard to every action of trespass *qu. cl. fr.*; and this appeared to me so important, and is, I apprehended, so unforeseen a result from the new rule of pleading, that I suspended my decision until I should have an opportunity of consulting with the other Judges of the Court.

It is to be observed, that the argument for the plaintiff proceeds differently with respect to the two statutes. In order to bring the case within the exemption from the former, the declaration alone is looked to; and although, upon the *whole record*, it appears that the action did not concern "any title or interest of lands, nor the freehold or inheritance of any lands," yet as it is in form an action of trespass *quare clausum fregit*, and upon the face of the declaration it might have done so, it is contended that it falls within the exemption. But, in order to take the case out of the operation of the latter statute, the plea is prayed in aid; and although upon the face of the declaration, "the freehold or title of the land" might have been "chiefly in question," yet, as upon the whole record it appears that it was not, so that the judge could not have certified that it was, the case was said to be without the statute.

It is therefore fitting to inquire, whether, upon the words of the statutes, or the construction put upon them by the Courts, this difference can be properly made. The words of the statute of *Charles* are, "in all actions

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of trespass, assault and battery, and other personal actions, wherein the judge at the trial of the cause shall not find and certify under his hand upon the back of the record, that an assault and battery was sufficiently proved by the plaintiff against the defendant, or that the freehold or title of the land mentioned in the plaintiff's declaration was chiefly in question," &c. The certificate, therefore, is directed not so much to what the action may have been brought for in the original view of the party, as to what takes place on the trial, which must depend on the issues on the record. And the policy of the statute was to collect the object of the action from the questions raised on the record, and considered at the trial. Accordingly, the numerous cases on the application of this statute have been decided upon a view of the whole record.

The plaintiff, however, has to take the case also out of the operation of the statute of *Elizabeth*. The words of that statute are these, "if upon any action personal, to be brought in any of her Majesty's Courts at *Westminster* not *being for* any title or interest of lands, *nor concerning* the freehold or inheritance of any lands, *nor for* any battery, it shall appear to the judges of the same Court, and so signified, or set down by the justices before whom the same shall be tried, that the debt or damages to be recovered therein in the same Court shall not amount to 40s. or above, that in every such case the judges and justices before whom any such action shall be pursued, shall not award to the party plaintiff any greater or more costs than the sum of the debt or damages recovered shall amount to, *but less at their discretion*." It is argued, that whether the action is "*for* any interest in land" ought to be determined (as in one sense of the words it undoubtedly may) by looking at the declaration only; and that, where a trespass of little actual injury has been committed on lands, but which, if passed over, might be used to the prejudice of the title, there is a hardship in making

the plaintiff's *legal right* to costs dependent on the trespasser's plea, or the case either of mere denial or adverse title, which he might set up at the trial. In estimating the amount of this inconvenience, however, it must be remembered that the certificate of the judge is also necessary to deprive the plaintiff of his costs, the granting or refusing of which has never been considered merely a ministerial act; and which, therefore, in the exercise of ordinary discretion, it can scarcely be supposed would ever be granted in a case where it had appeared on the trial that the action had been brought in the *bonâ fide* assertion of a right. It must be observed, too, that the opposite rule, if adopted, must make the declaration a *conclusive* test, ousting the judge and the Court of all discretion; and enabling a plaintiff, on whose land the slightest proveable trespass has been committed, to recover his full costs, even in the most vexatious action.

I am of opinion, however, that we do no violence to the words of the statute, and best effect its object if we determine that the judge and Court must ascertain what the action is "*for*" and what it "*concerns*," not merely by the form of the declaration, but by the issues found for the plaintiff on the whole record. The statute does not, in terms, except this or that form of action; any personal action being for any interest in land would be within the language of the exception. This might be founded on good reason;—for questions concerning the "title or interest of lands" might then, as now, be raised in replevin, or in actions on the case as well as in trespass *quare clausum fregit*, and, when so raised, would have been equally within the reason of the exception. Yet, in replevin, the declaration would not; and in case, even the whole record might not disclose, that it was the object of the action to try any matter of title or interest in land. Now, it is a strong objection to the adoption of any test, that it is not applicable to all the cases within the same

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principle, which it may be necessary to bring under examination. A general rule, too, must be framed to meet the ordinary run of cases, and not particular instances of fraud or evasion; and in this point of view, the safest mode of ascertaining the object of an action is to see what the parties come to issue upon. Further, it is material to advert to the concluding words of the section, which authorize the Court, at its discretion, to award even less costs than the sum of the debt or damages found; and I do not see how that discretion can be exercised upon a view of the declaration only; or a consideration of any thing less than the whole record and the report of the judge. It is, lastly, very desirable to adopt the same rule with respect to two statutes relating so entirely to the same subject-matter.

Upon reference to the authorities, it will be found that they bear out this view of the case. It is well known that the clause in question was not acted upon for a very long time; so late as the case of *Reeves v. Butler* (a), it appears that no certificate had ever been granted, and it is probable that the first was granted by Lord Chief Justice *Willes* in 1744, nearly a century and a half after the passing of the statute. This will account, in some measure, for the small number of reported cases on the subject. They are collected in Baron *Hullock's Treatise on Costs*. The greater part of them are cases not of trespass *quare clausum fregit*; but the same point is necessarily involved, and it will be found in all of them, that the Courts have taken into consideration the whole record and the matter contested at the trial, in order to see whether the case was or was not within the operation of the statute. The same remark applies to *Wright v. Piggin*, before mentioned.

I am of opinion, therefore, that the same plea, which is properly relied on as taking this case out of the operation

(a) Bunbury, 207. See 1 Wils. 94, *Walker v. Robinson*.

of the statute of *Charles*, brings it within that of the statute of *Elisabeth*, and, consequently, that the judge's certificate is operative.

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There was a second part of this rule as to the *postea*, on which, it appears to me, the plaintiff is entitled to what he prays for.—As he has succeeded, and recovered damages on part of his cause of action, he is entitled to have the *postea* delivered to him.

The rule will, therefore, be discharged in part, and made absolute in part, without costs.

Rule accordingly.

PENSON's Bail.

CHILTON opposed this bail, and objected that the affidavit of justification did not comply with the rule of *Trinity Term*, 1 *Will. 4*, s. 3 (a), as it omitted to state the nature of the property of one of the bail.

If a defendant in justifying his bail adopts the new practice under *Reg. Gen. T. T. 1 Will. 4*, he must conform to it strictly; and therefore an affidavit of sufficiency, though good by the old practice, but defective by the new, is insufficient.

Whateley contrd.—This affidavit is sufficient according to the form used previous to the rule of *Trinity Term*, 1 *Will. 4*. The defendant is not bound to adopt the form there given. That rule only says, if the notice of bail is accompanied by an affidavit in the form there given, and the bail are excepted to and allowed, that the plaintiff shall pay the costs of justification. That rule is only directory, according to a reported case (b). This is a case of country bail, and notice of bail was given according to the rule of *Trinity Term*, 1 *Will. 4*; but that case is an express authority to shew, that the affidavit need not be in the form there given. The only consequence will be, that the plaintiff will not be obliged to pay the costs of justification, if the bail are allowed.

(a) Ante, Vol. 1, p. 103.

(b) *Anon.* ante, Vol. 1, p. 115.

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PATTESON, J.—It is desirable there should be no confusion in the practice in these cases. The practice before the rule in *Trinity Term*, 1 *Will.* 4, in country bail, used to be, to send the affidavit of justification up to town, at the same time with the bail papers. The affidavit, however, was not used until the bail were excepted to. But if a defendant now chooses to proceed under the new rules, he cannot say afterwards he will not be bound by those rules. A party, who has given notice of bail, justifying according to the new rules, has thereby adopted them, and shall not be allowed afterwards to turn round and depart from the form of affidavit thereby given. I am not aware that this point has been expressly determined by any of the Courts, but it is desirable that the practice should be settled.

Bail rejected.

DOE *d.* WILLS *v.* ROE.

In order to entitle a tenant in possession in an action of ejectment to enter into the consent rule, without confessing ouster, it is not sufficient to shew that he holds under a tenant in common.

CHILTON shewed cause against a rule *nisi*, obtained by *Cook*, calling on the lessor of the plaintiff to shew cause why the tenant in possession should not be at liberty to enter into the consent rule, confessing only lease and entry, without ouster, unless an actual ouster of the plaintiff's lessor should be proved at the trial. The ground of the opposition was, that a question as to tenancy in common might arise at the trial. The affidavit, on which the rule was obtained, did not shew, that the tenant was sufficiently interested in such a question, to entitle him to have this rule made absolute. It merely swore, that he held under a person, who was a tenant in common, and that the action might involve a question between tenants in common.

Cook, in support of the rule, cited *Doe d. Gigner v.*

Roe (a), in which case it was held, that where a defendant in ejectment shews by affidavit that he is coparcener, joint tenant, or tenant in common, and denies actual ouster, which was here the case, the Court will permit him to confess lease and entry only, without confessing ouster.

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PATTESON, J.—There can be no doubt that if the tenant were a tenant in common, he would be entitled to this rule: yet he does not swear that he is, but merely that the person under whom he holds is. If the landlord had come in, and made himself a party to this application, it might have been different. The present rule must be discharged, with costs.

Rule discharged, with costs.

(a) 2 Taun. 397.

But see Howard v. Batho. 5. B. & L. 396.

CHELL v. OLDFIELD.

THOMAS moved for leave to sign judgment on an old warrant of attorney. The affidavit on which he moved, stated that the defendant was seen on the 14th of the present month, but did not go on to state that he was seen "alive" on that day.

In order to obtain leave to sign judgment on an old warrant of attorney, it is necessary to shew that the defendant was "alive," and not merely "seen" within a reasonable time before the application.

PATTESON, J.—That is not sufficient. It must be positively sworn that the defendant was seen "alive." There was a case in which a witness swore that he believed a party was alive, because he had seen him; and it turned out that he had seen him dead in his coffin.

Rule refused

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DYER v. LEVY.

An attorney is not within the Court of Requests Acts, so as to deprive him of his privilege of suing in the superior Courts at *Westminster*, unless it is so enacted in them, notwithstanding the Uniformity of Process Act.

MANSEL shewed cause against a rule nisi obtained by *Steer* for entering judgment for the defendant, and giving him treble costs, pursuant to the 10 *Geo. 3*, c. 29, s. 3, (the *Blackheath* Court of Requests Act), on the ground that plaintiff had sued the defendant in this Court, and recovered less than 40*s.*, the cause of action having arisen within the jurisdiction of the Commissioners under the said act. The plaintiff in the action was an attorney, and therefore he had a right to bring his action in one of the superior Courts at *Westminster*, notwithstanding the Court of Requests Act in question. Although by the 5 *Geo. 3*, c. 8, s. 28, which was one of the acts regulating the *Blackheath* Court of Requests Act, attorneys defendants were deprived of their privilege, attorneys plaintiffs were not deprived of it. The privilege of the attorney was the privilege of the client, and therefore, unless that privilege was expressly taken away, the Court would not hold an attorney to be deprived of it. It was true that the plaintiff had sued like any other person, by the ordinary writ of summons, and therefore, as far as the proceedings were concerned, it did not appear that he sued as an attorney; but since the passing of the Uniformity of Process Act, he could sue in no other way. The attachment of privilege was abolished by the first section of that act; (2 *Will. 4*, c. 39); yet, although that act abolished the particular form of writ, by which his privilege was to be enforced, it did not therefore abolish the privilege itself. He cited *Partington v. Woodcock* (a), wherein it was held that an attorney is entitled to retain his *venue* in *Middlesex*, notwithstanding the Uniformity of Process Act. The present rule ought, therefore, to be discharged.

(a) Ante, Vol. 2, p. 550.

Steer, in support of the rule, contended that, according to the language of the act of Parliament on which the present motion was founded, the present rule ought to be made absolute. The words of the section in question were, "That no action or suit for any debt not exceeding the sum of 40*s.*, and recoverable by the said acts, shall be brought, commenced, or prosecuted in any of His Majesty's Courts at *Westminster*, or in any other Court whatsoever, or elsewhere out of the said Court of Requests, against any person or persons residing or inhabiting within the limits of the several hundreds or places mentioned in the said acts; and that if any such action or suit shall be brought, commenced, or prosecuted, the defendant in any such action or suit shall and may plead the general issue; and in case the debt sued for or to be recovered in such action or suit doth not exceed the sum of 40*s.*, and the defendant shall prove by sufficient testimony that he was, at the time of bringing or commencing such action or suit, inhabiting and resident or dwelling within the limits of the hundreds or places mentioned in the said acts, and liable to be warned or summoned before the Commissioners of the said Court of Requests for such debt, then and in every such case the plaintiff in such action or suit shall not recover, but judgment shall be given for the defendant or defendants; and the Judge or Judges before whom the said cause shall be tried shall award that the plaintiff or plaintiffs in such action or suit shall pay to the defendant or defendants treble costs; and if any such action or suit as aforesaid shall be commenced or brought, and the plaintiff therein shall be nonsuited, or discontinue his action, or judgment be given against him on verdict or demurrer, the defendant or defendants, in such case, shall and may recover treble costs." The words of that section were general, and were those of an act subsequent to the one in which the provision with respect to attorneys defendants was, and there-

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fore must be considered as expressing the intention of the Legislature with respect to all persons, whether plaintiffs or defendants. The words of the previous act of Parliament (section 28) were "That no attorney at law, or solicitor, being served with the process of the said Court of Requests, or appearing in the same Court, shall be allowed to plead or maintain any privilege against the process, authority, jurisdiction, or judgment thereof." Those words only applied to attorneys defendants, and at that time; therefore the intention of the Legislature might be taken only to have extended the provisions of the act to attorneys defendants; but the words of the subsequent act being general, it must be taken that the Legislature intended to bring attorneys plaintiffs also within the provisions of the act. The reason of the exemption was as strong in one case as the other; for, whether the attorney was defendant or plaintiff in such inferior Court, his client would be as much prejudiced in the one case as the other by his absence from the superior Courts, to attend the suit in which he was concerned in the superior Court; and as the Court had not in terms reserved the privilege where he sues as plaintiff, the same rule must prevail whether he be plaintiff or defendant. If the Court coincided with that construction, the present rule ought to be made absolute.

Cur. adv. vult.

LITTLEDALE, J.—This was a case tried before the sheriff, and was an action brought by an attorney. The verdict was found for 1*l.* 14*s.* The present application was then made to sign judgment for the defendant, and give him treble costs, pursuant to 10 *Geo. 3, c. 29, s. 3*, the *Blackheath* Court of Requests Act. I was at first strongly inclined to think that, as the attorney had sued as an ordinary person would do, he was not entitled to his privilege of suing in the Courts at *Westminster* for a debt

cognizable in the inferior Court. On reconsidering my judgment, however, and finding that the Court of *Exchequer* has decided in two cases that an attorney plaintiff is not within the Court of Requests Acts, unless specially mentioned therein, I think the present rule ought to be discharged. It is true, that by the Uniformity of Process Act the *attachment* of privilege is abolished, but the privilege *itself* is not taken away. The act of Parliament, having abolished that particular form of suing, did not mean to interfere with his privilege. By its provisions, he is compelled to adopt the same form of process as any unprivileged person; but he does not thereby waive his privilege, as there is no other form he can adopt. I think, therefore, that the case does not come within the meaning of the Court of Requests Acts, on which this rule is founded. There is one provision in this act as to attornies, but that only applies to attorneys who are sued there as defendants, and therefore does not affect this question, where the attorney is plaintiff. The present rule must therefore be discharged, but without costs.

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Rule discharged.

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REX v. Justices of LEICESTER.

HUMFREY shewed cause against a rule obtained by *J. Hildyard* for a writ of *mandamus* to be directed to the Justices of *Leicester*, commanding them to enter appearances, and hear an appeal against an order of removal. The only question was, whether, under the words of the 4 & 5 Will. 4, c. 76, s. 79, a notice of appeal against an order of removal could be given after the expiration of twenty-one days subsequent to the notice of the order of removal. The words of the section were, "That no poor person shall be removed or removeable under any

An appellant is not bound by the provisions of the 4 & 5 Will. 4, c. 76, s. 79, to give notice of appeal within twenty-one days after notice of the order of removal being made.

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order of removal from any parish or workhouse, by reason of his being chargeable to, or relieved therein, until twenty-one days after a notice in writing of his being so chargeable or relieved, accompanied by a copy or counterpart of the order of removal of such person, and by a copy of the examination upon which such order was made, shall have been sent, by post or otherwise, by the overseers or guardians of the parish obtaining such order, or any three or more of such guardians, to the overseers of the parish to whom such order shall be directed. Provided always, that if such overseers or guardians, as last aforesaid, or any three or more of such guardians, shall, by writing under their hands, agree to submit to such order, and to receive such poor person, it shall be lawful to remove such poor person according to the tenor of such order, although the said period of twenty-one days may not have elapsed. Provided also, that if notice of appeal against such order of removal shall be received by the overseers or guardians of the parish from which such poor person is directed in such order to be removed within the said period of twenty-one days, it shall not be lawful to remove such poor person until after the time for prosecuting such appeal shall have expired, or, in case such appeal shall be duly prosecuted, until after the final determination of such appeal." The point, it was suggested, had been already decided in the case of *The King v. Justices of Suffolk* (a), when the Court was of opinion, that notice of appeal might be given after the expiration of the twenty-one days. No doubt, if such an opinion had been pronounced, it decided the present question, and therefore the rule for the *mandamus* must be made absolute.

Hildyard appeared in support of the rule, and referred to the case of *The King v. Justices of Suffolk*, which had not yet been reported. The full Court there decided,

(a) Not yet reported.

that the parish to which it was proposed to remove the pauper might give a notice of appeal after the expiration of the twenty-one days.

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PATTERSON, J.—That was the decision in the case of *The King v. Justices of Suffolk*. It appeared to the Court, that the only effect of the provision as to the twenty-one days, was to prevent the removal of a pauper until the expiration of twenty-one days, unless something was done by the parish, to which the order was directed, shewing an intention to yield to the order. But if the parish allowed the twenty-one days to pass without giving notice of appeal, then the parish might remove the pauper. The act, however, does not compel the parish to which the order is directed, to give its notice of appeal within twenty-one days, and deprive it of its right to appeal after that period. The consequence of not appealing within the twenty-one days is only the removal of the pauper. This was the judgment of the Court, in the case of *The King v. Justices of Suffolk*, and will therefore regulate my judgment. The present rule must therefore be made absolute.

Rule absolute.

CLARK v. CHETWODE.

THIS was an interpleader rule.

It appeared, from the affidavits, that a *fi. fa.* was issued shortly after *Michaelmas* Term against the defendant, under which certain goods were seized. While in possession, notice of a claim to the goods was served on the sheriff: it being then vacation, he applied for and obtained a summons, before a Judge at chambers, under the Interpleader Act. On hearing the parties, it was admitted that the 1 & 2 Will. 4, c. 58, s. 6, did not vest original power in

The Court will not, under the Interpleader Act, allow the sheriff his costs incurred by 'keeping possession, in consequence of a party refusing to consent to a Judge at chambers making an order in the case; no authority for that

purpose being given by the 1 & 2 Will. 4, c. 58, s. 6.

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a Judge to interfere for the relief of the sheriff. The execution creditor proposed, however, to consent that the Judge should make an order. To this course the claimant objected, on the ground of the Judge not being authorized by the act to make such an order, and, on that ground, ultimately refused to submit the case to the decision of the Judge.

A rule under the Interpleader Act was afterwards obtained by the sheriff, and the parties appeared before the Court.

Swann, on behalf of the sheriff, applied for the expenses to which the sheriff had been put in consequence of the refusal by the claimant to consent that the Judge at chambers should make an order for the arrangement of the matters in dispute. It was suggested, that those expenses should be paid by the claimant.

PATTESON, J.—I cannot visit the claimant with costs resulting from his refusal to adopt a course to which the law did not require that he should assent. The sheriff, therefore, is not entitled to those costs.

The case was then disposed of by a reference to the Master, the sheriff to keep possession of the goods until the report should be made, and the costs of keeping possession during that period to be allowed to him by the unsuccessful party.

Rule accordingly.

GRAY v. WITHERS.

On applying for judgment on an old warrant of attorney, it is sufficient proof of the defendant being alive that a letter in his handwriting has been received.

STEER moved for leave to sign judgment on an old warrant of attorney.—The evidence in support of the ap-

plication, to shew that the defendant was still alive, was the receipt of a letter from him, signed in his own handwriting.

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PATTESON, J.—That is sufficient proof, as the handwriting of the defendant is identified, and not a mere statement of receiving a letter purporting to be from him.

Rule granted (a).

(a) See *Sanders v. Jones*, ante, Vol. 1, p. 367.

COURT OF COMMON PLEAS.

May Term,

IN THE SIXTH YEAR OF THE REIGN OF WILLIAM IV.

IRVING v. HEATON.

In an affidavit of debt on a bill of exchange, by indorsee against the drawer, it is not necessary to state the default of the acceptor, or that notice thereof was given to the drawer.

An affidavit of debt on a bill of exchange need not state the date of the bill, if it allege it to be unpaid.

If a writ of *capias* be directed to the sheriffs of London, the subsequent insertion of the word sheriff (in the singular) will not vitiate it.

J. JERVIS moved for a rule to shew cause why the writ of *capias* should not be set aside, and why the bail-bond should not be given up to be cancelled. The affidavit of debt stated "that *Heaton* was indebted to deponent in 50*l.* as indorsee of a bill of exchange, drawn by *Heaton* upon, and accepted by, one *J. T.*, for the payment of 50*l.* to the order of *Heaton*, at a day now past, and by *Heaton* indorsed to deponent, and which said bill is *undue* and unpaid." It was objected that the affidavit ought to state the date of the bill, and also, that the acceptor had made default, and that due notice thereof had been given to the maker. It was also objected, that upon the face of the affidavit it appeared that the bill was not due, and if not due, it was perfectly consistent that it should be unpaid.

The Court overruled these objections, and considered the affidavit sufficient (a).

Jervis then objected to the writ.—It was properly di-

(a) See *Weedon v. Medley*, ante, Vol. 2, p. 689; *Shirley v. Jacobs*, ante, Vol. 3, p. 101.

rected to the sheriffs of *London* (a); but after commanding them to take the defendant in the usual form, it proceeded "and we do further command you, the said sheriff, that immediately after the execution hereof you do return this writ."

1836.
IRVING
v.
HEATON.

Per Curiam.—You may leave out the word "sheriff;" and then, as the writ is properly directed, it will be sufficient.

(a) See *Barker v. Weedon*, ante, Vol. 2, p. 707; *Nicol v. Boyne*, Id. p. 761.

LA PORTE'S Bail.

WILDE, Serjt., on a former day obtained a rule *nisi* to set aside a writ of *sci. fa.* against the bail, on the ground of irregularity. The irregularity complained of was two-fold—*First*, That the writ of *ca. sa.* was made returnable before it was lodged at the sheriff's office; and, *secondly*, that the *ca. sa.* had issued into *Middlesex*, the *venue* being in *London*.

A *ca. sa.* being made returnable before it issued, and having been issued into a wrong county, are irregularities of which the bail may take advantage by motion.

Talfourd, Serjt., shewed cause, and contended that the bail could not take advantage of these irregularities by application to the Court, but that the proper course was to plead them. In *Philpot v. Manuel* (a) it was held that the want of a *ca. sa.* against the principal must be pleaded. And *Dudlow v. Watchorn* (b) was an authority to shew that the objection as to the writ of *ca. sa.* having issued into the wrong county, should also be pleaded.

TINDAL, C. J.—This case is distinguishable from *Philpot v. Manuel*, for here a *ca. sa.* has in fact issued, which was good upon the face of it, and though the circumstance

(a) 5 D. & R. 615.

(b) 16 East, 39.

1836.

LA PORTE'S
Bail.

of its having issued into a wrong county may be pleaded, yet no authority has been cited to shew that this irregularity may not also be taken advantage of by motion.

Rule absolute.

In the Matter of the Trustees of Mrs. BARBER.

The affidavit
of the certificate
of the acknow-
ledgment of a
fine, may be
sworn before a
British consul.

TALFOURD, Serjt., moved that the officer might be directed to receive the certificate of the acknowledgment of a fine by a married woman. The affidavit in support of it had been certified by a *British* consul instead of a notary public. The 6 *Geo.* 4, c. 87, s. 20, after reciting that it is expedient that every consul-general, or consul, appointed by his Majesty at any foreign port or place, should, in all cases, have the power of administering an oath or affirmation whenever the same should be required, and should also have power to do such notarial acts as any notary public may do, it was enacted, that from and after the passing of this act, it shall and may be lawful for any and every consul-general appointed by his Majesty at any foreign port or place, whenever he shall be thereto required, and whenever he shall see necessary, to administer at such foreign port or place any oath, or take any affidavit or affirmation from any person or persons whomsoever, and also to do and perform at such foreign port or place all and every notarial acts or act which any notary public could or might be required and is by law empowered to do within the united kingdom of *Great Britain* and *Ireland*.

TINDAL, C. J.—Under the words “all and every notarial acts or act which any notary public is by law empowered to do,” we may fairly include the certificate to

the handwriting and authority of the party taking the affidavit of acknowledgment of a fine.

1836.

Trustees of
BARBER.

Rule accordingly.

ROGERS v. FRY.

KAYE moved that the acknowledgment of a fine taken before a special commissioner in *Ireland*, in pursuance of the provisions of 3 & 4 *Will. 4*, c. 74, s. 8, might be received. The affidavit of the certificate of the acknowledgment had been sworn before a person who was a commissioner for taking affidavits in the Court of *Common Pleas* in *Ireland*, but who was not a commissioner of this Court. The officer refused to receive the acknowledgment, in consequence of the rules *H. T. 4 Will. 4 (a)*, in which the heading of the form given for the affidavit of the certificate was, "Form of affidavit, verifying the certificate of acknowledgment, taken in pursuance of the act of Parliament, to be made by some practising attorney or solicitor, and to be sworn before a Judge of the Court of *Common Pleas*, or a commissioner appointed for taking affidavits in the said Court." In support of the motion, reference was made to *Kilby v. Stanton (b)*, in which case an affidavit, sworn before a commissioner of the Court of *Exchequer* in *Ireland*, was allowed to be read; and it was submitted the act of Parliament did not state before whom the affidavit should be sworn.

The affidavit verifying the certificate of the acknowledgment of a fine must be sworn before a Judge or commissioner of the *Common Pleas* in *England*: therefore, where the affidavit was sworn before a commissioner of the *Common Pleas* in *Ireland*, the Court refused to receive the acknowledgment.

Per Curiam.—The 3 & 4 *Will. 4*, c. 74, gives the Court the power of making rules, and the rule requires the affidavit to be sworn before a Judge, or a commissioner of this Court.

Application refused.

(a) Ante, Vol. 3, p. 120.

(b) 2 Y. & J. 75.

1836.

LA FOREST and Others v. LANGAN.

The Court will not, upon affidavit, set aside a plea upon which issue may be taken.

W. H. WATSON moved to set aside a plea, and to have leave to sign judgment. The action was brought on a bill of exchange; the defendant had pleaded that the bill was outstanding in the hands of a third person. The affidavit in support of the motion stated the plea was wholly false, and set out a letter of the defendant, addressed to the plaintiff, in answer to an application by him for payment of the bill, which stated that some pressing demands prevented the defendant from then taking up the bill, and requested the plaintiff to hold it for a short time. Reference was made to *Thomas v. Vander-mooler (a)*, *Bones v. Pinter (b)*, *Bartley v. Godslake (c)*.

TINDAL, C. J.—It is clear this is a plea upon which a distinct issue may be taken; and if we were to allow this rule, we should in effect be trying the case upon affidavit.

Rule refused.

(a) 2 B. & A. 197.

(b) 2 B. & A. 777.

(c) 2 B. & A. 199.

SYMES v. GOODFELLOW.

An arbitrator's decision on the admissibility of evidence before him is final.

Quære, if in an action against a husband for goods supplied to his wife, it is necessary to plead specially the adultery of the wife.

WILDE, Serjeant, shewed cause against a rule obtained by *Crowder* for setting aside the award made in this cause, on the ground that the arbitrator had received evidence which was not admissible on the issues raised by the pleadings. The action was brought for the board and lodging of defendant's wife, and also for goods sold, and money

lent to her. The defendant pleaded *non assumpsit*, and a set-off. After the plaintiff had established his case before the arbitrator, the defendant's attorney proposed to give evidence of the adultery of the wife. It was objected that this evidence could not be received under the plea of *non assumpsit*, but should have been specially pleaded. The arbitrator over-ruled the objection, and ultimately awarded in favour of the defendant. Reference was made to *Jupp v. Grayson (a)*, and it was contended that the arbitrator was the proper judge as to whether the evidence should be received, and that his decision was final.

1836.
 SYMES
 v.
 GOODFELLOW.

Crowder, in support of the rule, contended, that the arbitrator had been deciding on an issue in fact, which was never raised before him.

TINDAL, C. J.—I feel some difficulty in saying that this is a matter which must be pleaded; it seems to me to negative the facts out of which the implied promise arises. But, as the point is doubtful, we will not take the judgment from the arbitrator; he is the person to decide, if evidence be admissible, whether the objection arises from incompetency or the state of the pleadings.

Rule discharged.

(a) 1 C. M. & R. 523.

HOLLINGSWORTH v. BRIGGS.

MAULE shewed cause against a rule, obtained by *R. V. Richards*, for amending the pleas in the cause. The action was brought on a policy of insurance; and the de-

A plaintiff cannot object to an amendment of the defendant's pleas on the ground of a witness who has gone abroad having been examined with respect to the issue then joined, if the plaintiff has had notice of the proposed amendment before the examination took place.

1836.
HOLLINGS-
WORTH
v.
BRIGGS.

fendant (among other pleas) had pleaded in substance, "that the vessel was not seaworthy, and was not worth repairing," and also that "the vessel was overladen in weight." It was proposed to amend these pleas by omitting the words "not worth repairing," and by stating the cargo was so stowed as to be improper for that particular vessel, instead of the allegation that the vessel was overladen. Issue was joined on the 17th of *December* last, and on the 22nd a judge's order was obtained for examining one of the plaintiff's witnesses, who was about to go abroad. At the time the parties attended the Prothonotary for the purpose of the examination, a notice was delivered to the plaintiff's attorney, specifying the intended alteration in the pleas. It was objected that the defendant was not entitled to vary the issue after the plaintiff's witness had been examined, as the examination was framed to meet the then present state of the record.

R. V. Richards, in support of the rule, contended that the defendant ought not, since the new rules, to be in a worse situation than he was before. Before the new rules he might, under the general issue, have shaped his defence to meet the plaintiff's case; and it would be inconvenient to lay down a general rule, that because a witness had been examined, no amendment should be allowed.

TINDAL, C. J.—The first intended alteration cannot affect the rights of the plaintiff, and therefore the words "not worth repairing" may be struck out. With respect to the other proposed alteration, it seems the plaintiff was duly informed of the defendant's intention to make this amendment before the witness was examined. I do not think it necessary in the present case to lay down any general rule: if the plaintiff intended to object to the amendment, he should have done so before the witness was examined. He had a reasonable notice given to him ;

for it appears, that during the early part of the examination a paper was tendered, stating the proposed amendments. It was then his own affair to go on with the examination: he might immediately have put a stop to it, and thrown the costs on the adverse party.

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HOLLINGS-
WORTH
v.
BRIGGS.

PARK, J.—I forbear to lay down any general rule when the case will admit of a decision upon the particular circumstances. I think the ground upon which the Chief Justice has put this case is the true one.

GASELEE, J.—There is no impropriety in allowing these amendments.

BOSANQUET, J.—I agree with the rest of the Court. A notice was given before the examination was entered into; but no application made to put off the examination.

Rule absolute.

MORGAN v. PEDLER.

TALFOURD, Serjt., shewed cause against a rule obtained by *Wilde*, Serjt., to enable the defendant to pay into Court the sum claimed, together with 20*l.* to answer costs, pursuant to the 7 & 8 *Geo. 4*, c. 71, s. 2. The action had been commenced by "foreign attachment" in the Lord Mayor's Court, and was removed at the instance of the defendant by *certiorari*. It was contended, that this was not a case in which money could be paid into Court in lieu of special bail, and if bail was not perfected in due time, the plaintiff would be entitled to a *procedendo*. The 7 & 8 *Geo. 4*, c. 71, s. 2, enacts, "that in all cases where any defendant shall have been *arrested* and shall have given bail to the sheriff, or shall have been *arrested* and remain in custody; it shall be lawful for such defendant, instead of putting in and perfecting special bail, to

Where the action has been commenced in an inferior court without process against the person, and afterwards removed, *semble*, that the defendant cannot pay money into Court in lieu of special bail.

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v.
FEDLER.

deposit and pay into the said Court the sum indorsed upon the writ, together with the further sum of 20*l*., as a security for the costs of the action." Here, there was no process against the person of the defendant, but only an attachment of his goods.

Wilde, Serjt., in support of the rule.—The object of the statute is to prevent persons being placed in the situation of going to prison because they cannot find bail, although they may have the money. It is true, that, in the first instance, there is no process against the person of the defendant, but there is a process tending to produce all the evil the statute meant to remedy. Courts of law will not compel parties to resort to a circuitous course, when the same object can be obtained by a more direct method. Under the old bankrupt act, the only way the bail could obtain relief was by rendering the bankrupt to prison, and then the bankrupt was entitled to be discharged. But the Courts considered this circuitous course a waste of expense, and allowed an *exoneretur* to be entered. The 4th section of 7 & 8 Geo. 4, c. 71, enables a defendant having perfected bail to exonerate them by bringing the money into Court; so that if the present defendant could find persons to become bail for him, he could then pay the money into Court. It could not therefore prejudice the plaintiff to allow the defendant to pay in the money without going through this process.

The Court seemed doubtful whether this was a case within the statute, and recommended the plaintiff's counsel to advise his client to consent to the money being paid into Court.

On a subsequent day the plaintiff's counsel stated, that his client would not consent to the money being paid into Court, as he was desirous of a *procedendo*, and as the 20*l*. mentioned in the statute was not sufficient to cover costs. After some further discussion, it was ultimately agreed

that the sum claimed should be deposited with the Prothonotary, together with whatever sum he should think necessary, as a security for costs.

Rule accordingly.

1836.
MORGAN
v.
PEDLER.

—◆—
GRIFFIN v. YEATES.

ASSUMPSIT by indorsee against acceptor of a bill of exchange. *Plea*—That there was not at any time any consideration or value for the defendant's accepting the said supposed bill of exchange, or paying the amount of the said bill, or any part thereof; and that the drawer indorsed the said bill to the plaintiff without any value or consideration for so doing; and the plaintiff hath held, and before and at the time of the commencement of this suit did hold, the said bill, without any value or consideration for his having been or being the holder thereof. *Replication*—That there was consideration and value for defendant's accepting the said bill of exchange, and paying the amount thereof; and that the drawer indorsed the said bill to the plaintiff for value and consideration for so doing; and the plaintiff hath held, and before and at the time of the commencement of this suit did hold, the said bill for value and consideration for his having been and being the holder thereof. *Demurrer*—Assigning for causes that the replication was double, and put two several and distinct matters in issue.

The replication *de injuria* will in future be allowed in actions of *assumpsit*.

Scriven, Serjt., in support of the demurrer.—The replication is bad, inasmuch as it puts in issue two distinct matters, either of which would be an answer to the plea. If the plaintiff gave value for the bill, he would be entitled to recover, though the defendant had accepted it without consideration (a). So, if the defendant received considera-

(a) *Collins v. Martin*, 1 B. & P. 651; *Fentum v. Pocock*, 5 Taunt. 193; *Chitty on Bills*, 90, 91.

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tion, he would be liable. The replication, then, should have taken issue on one or other of these facts; the plaintiff should have said, either that the defendant did not accept the bill without consideration, or that it was not indorsed without consideration (a). "In debt on bond, conditioned to abide by the award of *J. P.*, so that he made the same and delivered it to the parties before a certain day; the defendant pleaded that no award was made or delivered before the day, and the Court held the plea double; for it was a good plea that no award was made before the day, and it was also a good plea that no award was delivered before the day."

Butt, in support of the replication.—Where a plea contains several traversable facts, the plaintiff is not bound in his replication to select one of them; if taken together, they make up but one defence; they may all be put in issue, *Selby v. Bardons* (b). In *O'Brien v. Saxon* (c), the trading, the petitioning creditor's debt, and the act of bankruptcy, were put in issue by the replication. *Noel v. Birch* (d) is an authority to shew that the replication *de injuriâ* may be used in actions on contracts; there, to a declaration on a bill of exchange by indorsee against drawer, the defendant pleaded that his indorsement was in blank, and that he delivered the bill to a person to get discounted, who indorsed it to another person, from whom the plaintiff took it with a full knowledge of the facts; and a replication that the defendant broke his promise without the cause mentioned in the plea, was held to be good in substance.

Scriven, Serjt., in reply.—The cases cited are all replications *de injuriâ*, which is an exception to the general rule, that several facts cannot be put in issue. *Selby v.*

(a) Brookes's Abridgment, tit. Double Plea, p. 90.

(b) 3 B. & Adol. 2.

(c) 4 D. & R. 579; 2 B. & C. 908.

(d) Ante, p. 228.

Bardons shews this, for *Parke, J.* says "it is a general rule that where any pleading comprises several traversable facts or allegations, the whole ought not to be denied together but one point alone disputed." In *Robinson v. Bailey* (a), the defence was, that the cattle were entitled to common; but, in order to establish this, it was essential that the cattle should be the defendant's, and should also be levant and couchant, so that these several facts made up but one point, and on that ground the replication was held good.

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 v.
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The Court were of opinion that the replication, putting both matters in issue ought to be allowed. It was a great hardship on the plaintiff that the rules of pleading compelled him to admit a fact which was taken advantage of at the trial to slander his title. They would therefore take time to consult the other Judges.

On a subsequent day, *TINDAL, C. J.*, said, the Court had considered this case, and thought the plaintiff ought not to be confined to a single point; but as the form *de injuriâ* was more proper, the plaintiff might amend on payment of costs; and, in future, the replication *de injuriâ* would be allowed in actions of *assumpsit* in all cases to which it is applicable.

Leave to reply *de injuriâ* on payment of costs.

(a) 1 Burr. 316.

1836.

LEIGH v. LEIGH.

A writ of right issued on the 29th Dec., 1834, returnable on the 26th Jan., 1835. The return day was altered from term to term until it was finally made returnable in Nov. 1835:—*Held*, that the resealing made it a new writ, and the right of action was barred by the 3 & 4 Will. 4, c. 27, s. 36.

WILDE, Serjt., moved to set aside the service of the summons, grounded on a writ of right. The writ (which had been returned) had issued on the 29th December, 1834, and was first made returnable on the 26th January, 1835. That return day had been altered from term to term, until the writ was finally made returnable on the 21st November, 1835, in which month the summons was served. The process filed was for a writ, returnable the 26th January, 1834. The question was whether, under these circumstances, the right of action was not barred by the 3 & 4 Will. 4, c. 27, s. 36, which enacts, that "no writ of right, and no plaint in the nature of any such writ, shall be brought after the 31st December, 1834." A rule *nisi* having been obtained—

Humfrey shewed cause upon an affidavit, which stated that the demandant had brought an ejectment for the recovery of the same property, which action had been suspended by an injunction from the Court of Chancery. That, being unwilling to harass the tenant by double proceedings, the demandant had caused the writ to be resealed every term until November, 1835; and the Court having decided against him after last Trinity Term, he caused the writ of summons to be served in November. It was contended that it was not necessary to sue out a new *præcipe* upon the resealing of a writ, and that therefore the *præcipe* of December, 1834, was sufficient to warrant the writ served in November, 1835.

TINDAL, C. J.—The question submitted to the consideration of the Court depends upon the construction which is to be put upon the 36th section of 3 & 4 Will. 4, c. 27. By that clause it is enacted, that no writ of right shall be brought after the 31st December, 1834. On the

face of this writ it appears to have been sealed on the 29th *December*, 1834, but we also find the return has been altered at different periods; and when the party is called upon for an explanation, it seems the writ was not served when it ought to have been, in *December*, 1834. Is this, then, a writ brought after the 31st *December*, 1834? I can look at no time as the commencement of the suit other than the time at which the writ is sued out for the purpose of being carried into effect. A writ of right is described in *Finch's Law*, 237, as a mandatory letter from the King. In the present case the demandant has treated it as an imperative instrument at the time it was first sued out, and has retained it in his hands until it was resealed in *November*, 1835. Now let us consider what is the effect of the resealing the writ. As it seems to me, the demandant has put a meaning upon it by his own conduct. He might undoubtedly have considered this as the commencement of the action; but when the period for pursuing his remedy passed, he, by resealing, made it a new writ. If we were to allow this writ to be considered the commencement of the action, we should be setting aside the operation of the statute. It was the duty of the demandant when he found himself in difficulties to seek the advice of those who were competent to give it. If at the time when he brought his writ of right, which is a remedy of the highest nature where the freehold is sought to be recovered, he had served the writ instead of pursuing the minor remedy, he might have brought the party into Court. I once more repeat it, if we were to sanction this course of proceeding, we should be acting against the statute.

PARKE, J.—I am of the same opinion.

GASELEE, J.—This is analogous to the Statute of Limitation. When we sue out a writ to save the operation of the statute, to render the writ available, it must be returned.

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v.
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v.
LEIGH.

BOSANQUET, J.—It has been the object of the legislature to put an end to writs of right, with certain exceptions, which it is not pretended is the case here. It seems to me that if we were to allow this writ, we should be permitting a commencement of an action after the time limited by the statute.

Rule absolute.

FOOT v. SHERIFF.

Until a writ of right has been returned the Court of *Common Pleas* has no jurisdiction in the cause.

The Court of *Common Pleas* has no power to set aside a writ of right, that being a writ out of *Chancery*.

TALFOURD, Serjt., moved for a rule to shew cause why the writ of right and summons issued thereon should not be set aside. The objection was, that the writ had been altered in respect of the day on which it was made returnable, and resealed. On the 24th *October*, a summons was served on the deforciant to appear on the 2nd of *November* following, and on the same day he was afterwards served with a notice not to appear to that summons. On the 31st of *October* another summons was served upon him, requiring him to appear on the 21st of *November*. Application being made at the sheriff's office to see the writ of right, it was found with a paper annexed to it, on which was written "Since this summons was served, the writ has been resealed, and the return altered. The deforciant will to-day be served with notice not to appear to this summons, and will be served with a fresh one."

Wilde, Serjt., and *W. H. Watson* shewed cause.—The alteration has been made during the period within which the writ might properly issue, and therefore, it does not resemble the case of *Leigh v. Leigh* (a), where the objection was, that the return was altered to a day after

(a) Ante, p.650

the time limited for suing out writs of right. It is necessary that a certain number of days should intervene between the service and the return of the writ; but in the present case the sheriff omitted to serve it time enough to allow the requisite number of days: the service was consequently void, and might have been set aside; it is the same, then, as if the writ had been altered before it issued. The mere alteration is not an irregularity; if the return is consistent with the original form, it may be done. *Durden v. Hammond* (a). This writ stands in its present form as it might originally have issued. The Courts have in several instances allowed the amendment of writs. In *Carr v. Shaw* (b), leave was granted to amend a special *capias*, in order that an application might be made to the Master of the Rolls to procure a new original; and in *Cox qui tam v. Munday* (c), omission of trespass and entering only the plea of debt in a bill of *Middlesex*, by a common informer, was held amendable. But, at all events, in the present case, the writ has never been returned, and therefore this Court has no jurisdiction. The summons is the summons of the sheriff; this Court has no power over it: as the return alone gives the Court jurisdiction. Formerly, a *capias quare clausum fregit* would not bar the Statute of Limitations, without it was shewn to be returned (d). In *Leigh v. Leigh* (e), the writ had been returned; and besides, there, the application was to set aside the service of the writ.

Talfourd, Serjt., and *B. Andrews*, in support of the rule, contended that this writ could not have been amended even by the Court of *Chancery*. The 14 *Edw. 3*, and 9 *Hen. 5*, only authorized amendments of misprision of a

- (a) 2 D. & R. 211; 1 B. & C. 111. (d) *Brown v. Babington*, 2 Ld. Raym. 880.
 (b) 7 T. R. 299. (e) *Ante*, p. 650.
 (c) 1 Black. Rep. 462.

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letter or syllable. In *Blackmore's case* (a), Lord Coke specifies the different misprisions of the clerk amendable by the 8 Hen. 6, c. 12, none of which apply to the present case. The alteration is clearly an irregularity. Where a defendant was served with a copy of a writ instead of a special *capias*, and afterwards got the cursitor to alter the return of the original, this alteration was considered erroneous, and the writ superseded (b). In *Miller v. Miller* (c), it was a mere mistake of the officer in making the writ returnable on a *dies non*. At all events, *Leigh v. Leigh* (d) is an express authority for setting aside the summons.

TINDAL, C. J.—This application may be disposed of on the short ground, that we have no jurisdiction in the present case. The writ commands the sheriff to warn the tenant, that presently and without delay, he render to the demandant the land, which he claims as his right. It appears to me perfectly clear, that until the sheriff has made his return to that writ, the Court of *Common Pleas* has no jurisdiction. *Blackstone*, (who cites *Fleta*, l. 2, c. 34,) describes an original writ as a mandatory letter from the King, in parchment, sealed with his great seal, and directed to the sheriff of the county wherein the injury is committed, or supposed to be, requiring him to command the wrong-doer, or party accused, either to do justice to the complainant, or else to appear in Court, and answer the accusation against him. Whatever the sheriff does in pursuance of this writ, he must *return* or certify to the Court of *Common Pleas*, together with the writ itself, which is the foundation of the jurisdiction of that Court, being the King's warrant for the Judges to proceed to the termination of the cause. The return, therefore, of the writ is the foundation of the jurisdiction of

(a) 8 Rep. 156.

(c) Ante, p. 144.

(b) *The Weavers' Company v. Heywood*, 3 Atkyns, 362.

(d) Ante, p. 650.

this Court. *Comyns*, in his *Digest*, tit. *Droit*, (C. 2.) says, "If the tenant does not appear at the return of the summons, nor be essoined, a *grand cape* issues against him. If he does not appear at the return of the *grand cape*, judgment final shall be given against him." It appears, therefore, that we have no jurisdiction, because the writ has not been returned; and even if it had been returned, we are asked to do a thing over which we have no power—to set aside a writ issuing out of the Court of *Chancery*. In *Leigh v. Leigh* (a), the application was not to set aside the writ, but the service of the writ; and, besides, the writ had there been returned, and erasures were apparent on the face of it. All we did in that case was, to relieve the tenant from the inconvenience he might incur, either in appearing or not appearing, and to give the demandant an opportunity of appealing to the Court of *Chancery*. But, at all events, as the application is to set aside the summons, and the writ has not been returned, it is *coram non judice*.

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PARK, J.—I agree that we have no jurisdiction in this matter. Here is nothing to act upon, as the writ has not been returned into this Court. It is the return of the writ which is the foundation of our jurisdiction. Besides, we are asked to set aside a writ issuing out of the Court of *Chancery*. There is a valid distinction between this case and that of *Leigh v. Leigh*, for there, the writ had been returned.

GASELEE, J.—The Court of *Common Pleas* has no jurisdiction but what arises out of the Court of *Chancery*. Until the writ is returned, we have no authority to act.

BOSANQUET, J.—It seems to me also, that unless the writ has been returned, we have no jurisdiction in the matter.

Rule discharged.

(a) *Ante*, p. 650.

COURT OF EXCHEQUER.

Hilary Term,

IN THE SIXTH YEAR OF THE REIGN OF WILLIAM IV.

GEORGE v. THOMPSON.

Notice to produce an agreement served upon the defendant's attorney at five o'clock on the commission day of the Assizes, held too late, the attorney having then left home for the Assize town, which was nine miles distant from his office, and the opposite party refusing to furnish him with a conveyance.

THIS was an action against the defendant as off-going tenant, for leaving the land in an improper condition. There was but one part of the written agreement, and the defendant had the possession of it. At the trial before *Gaselee, J.*, at the *Chelmsford* Assizes, the defendant's attorney being in Court, was called upon to produce the original agreement: but it was objected, that proper notice to produce had not been given. It appeared that the defendant himself lived at a place between two and three miles beyond *Billericay*, at which latter town his attorney resided, and which was nine miles from *Chelmsford*. A notice to produce the original agreement had been served at the attorney's residence at *Billericay*, at about five o'clock in the afternoon of *Monday*, being the commission day, the attorney being then at *Chelmsford*, from whence he had not returned to his home before the trial came on; and a similar notice had been served about the same time upon him in *Chelmsford*, upon which he offered to go that evening to *Billericay*, where he thought he should be able to discover the agree-

ment, if the plaintiff's attorney would furnish him with a proper conveyance, which the latter declined. No notice had been served upon the defendant himself. It was alleged that the plaintiff did not know whether the defendant or his attorney had possession of the agreement. *Gaselee, J.*, at the trial held the notice to be insufficient, and the plaintiff was nonsuited.

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Platt moved to set aside the nonsuit, and contended that the notice was sufficient.

LORD ABINGER, C. B.—Was the attorney bound to go to his client immediately to fetch the document, when he was making preparation for the assizes, and would have to be at *Chelmsford* early the following morning?

ALDERSON, B.—You might have served the client as well as the attorney, or you might have asked the attorney before, whether he had it.

Platt.—They are identified: it was not denied that the attorney had the document. The learned Judge held that service on the commission day was too late.

LORD ABINGER, C. B.—Whether a notice is served in time is peculiarly a question for the Judge at the trial. We will speak to the learned Judge about it.

On a subsequent day, *The Court*, after conference with the learned Judge, said, that under the circumstances they thought the nonsuit quite right, and consequently there would be no rule.

Rule refused.

1836.

ATKINS v. MEREDITH.

A notice to produce a tradesman's books served upon the plaintiff's attorney at seven o'clock of the evening previous to the day of trial is too late.

If a rule is moved without affidavits, none can be used in answer to it.

THIS was an action for goods sold and delivered. The question at the trial was, to whom credit was given. A notice had been served by the defendant's attorney upon the plaintiff's attorney, calling upon the plaintiff to produce his books. This notice was served at seven o'clock in the evening of the day preceding the day of trial. The plaintiff himself was a tradesman, residing in *South Molton Street, Oxford Street*. His attorney's office was in *Bread Street*, between two and three miles distant. The books were not produced at the trial, the plaintiff contending that the notice was not sufficient; in consequence, however, of the absence of the books, a verdict passed for the defendant.

Cleasby obtained a rule *nisi* for setting aside this verdict, and relied upon *Sims v. Kitchen* (a) as an authority that the notice was too late.

Humfrey shewed cause, and contended that the usual notice had been given. He proposed to use affidavits which had been made in opposition to the rule: but this was objected to, as the rule was not moved on affidavits; and *The Court* held, that he was not at liberty to use them.

PARKE, B.—I think that this notice was not given in reasonable time. If it had been to produce a document presumed to be in the attorney's possession, it would have been sufficient: but books like those in question cannot be presumed to be in the possession of the attorney.

ALDERSON, B.—I think the rule should be absolute.

(a) 5 Esp. 46.

This is very similar to the case of *George v. Thompson* (a), lately decided in this Court.

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GURNEY, B.—Service of a notice on the evening previous to the trial is in general sufficient, but it is not so here.

BOLLAND, B., concurred.

Rule absolute.

(a) Ante, p. 656.

GREEN v. ROHAN.

HUMFREY obtained a rule *nisi* for discharging the plaintiff *Green* out of the custody of the sheriffs of *London*, on the ground that after judgment had been obtained against her, she had married, and that a *ca. sa.* had since issued against her without a *scire facias* being sued out.

Where a motion is made to discharge a prisoner out of custody on the ground of irregularity in the process, it must be positively alleged in the affidavit that the party was taken into custody upon the process.

Ellis shewed cause, and objected that the affidavits in support of the rule did not allege positively that she had been arrested upon the *ca. sa.*

Humfrey prayed for time to add that fact.

The Court refused to allow further time, and discharged the rule, with costs.

Rule discharged, with costs.

1836.

VERNON v. TURLEY.

Proceedings against bail to the sheriff are not waived by the plaintiff declaring *de bene esse* in the original action, after the bail have been served with process.

The drawer of a bill of exchange having been arrested, his brother agreed with the plaintiff that upon the defendant's agreeing to give goods to a certain amount within a month, and a bill of exchange for the remainder, this action, and another against the acceptor, should cease, and the bill be destroyed; but if the agreement was not performed, the plaintiff might proceed. Within the time two bills of exchange for part of the debt were sent to the plaintiff, which he kept and gave credit for, but the goods were not sent; the defendant soon after became bankrupt; the plaintiff then took proceedings against the bail:—*Held*, that the bail were not discharged either by time being given or by the plaintiff's keeping the two bills.

Bail knowing of an agreement to give time, must apply for relief immediately on being served with process.

ARCHBOLD moved to set aside proceedings against the bail, upon the bail-bond, on two grounds—*First*, that time had been given to the principal; and, *secondly*, that after proceedings had been commenced against the bail, the plaintiff had declared in the original action. From the affidavits of the defendant and bail, and other persons, it appeared that the defendant having been arrested on the 25th of *September*, the following agreement in writing between the plaintiff and defendant was signed by the plaintiff:—"Memorandum, *Sept. 29, 1835*.—I do hereby agree to cause both actions to be ceased that are commenced against *Isaac Caddick* and *James Turley*, and to destroy a bill accepted by *Isaac Caddick*, and drawn by me, amount 260*l.*, four months, upon *James Turley* entering into an agreement to pay me the balance of my account, as shall be agreed upon between the parties; part in iron, in one month's time, and the remainder in acceptance, two months from the date hereof: if the said *James Turley* does or should not fulfil his agreement, the present action against him may be proceeded with: the bill of 260*l.*, drawn 10th *April, 1835*, four months, I received from *James Turley*.—S. W. VERNON." That this agreement was entered into by the defendant without the knowledge of the bail, and for the purpose of freeing them from their responsibility; that on the 20th of *October* the defendant sent the two bills mentioned in the agreement to the plaintiff, in part performance of the agreement; that the plaintiff had since rendered an account to the defendant, in which credit was given to the defendant for the sums of 100*l.* and 115*l.*; and that the defendant intended to have

delivered the iron, but that he was prevented by a fiat in bankruptcy being issued against him; that the plaintiff's attorney afterwards, on being applied to for particulars, wrote to the defendant's attorney, that he had seen his client, and that he believed the action was arranged; that the defendant had told the bail that the action was settled, and that they in consequence neglected to put in special bail in due time; that the proceedings against the bail were not commenced till eight days after the issuing of the fiat; and that after the bail had been served with process, issued on the 16th of *November*, the plaintiff declared *de bene esse* in the original action on the 18th, and this was followed by a declaration against one of the bail (on whose behalf the motion was made) on the 24th. A summons to set aside proceedings on the bail-bond for irregularity was attended before Mr. Baron *Gurney* on the 8th of *December*, when his Lordship refused to make any order. The present motion was made on the 15th of *January* (the 5th day of term). *The Court* granted a rule *nisi*.

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Erle and *Whitmore* shewed cause.—They contended that the irregularity, if any, had been waived. On the 2nd of *December* an order for time to plead was obtained; and, after the summons was dismissed by *Gurney*, B., on the 8th, the defendant, on the 9th, pleaded a bad plea, to which the plaintiff demurred; and the defendant having been ruled to join in demurrer, delivered a joinder in demurrer, since which the issue was made up, and this motion was not made till afterwards. With respect to the agreement alleged to have been made by the plaintiff with the defendant *Turley*, it was positively sworn in answer that the agreement was made not with the defendant, but with *Richard Turley*, a brother of the defendant, and it was upon the express condition that if it was not performed proceedings might go on; and notice was afterwards given that the plaintiff was proceeding in consequence of the

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agreement not being performed by the delivery of the iron. *Ladbrook v. Hewitt* (a) shewed that a mere honorary engagement did not discharge the bail. This agreement was not binding on the plaintiff; but, if it was, as the knowledge of the argument must, according to the statement of the bail himself, have come to him on the 2nd of October, it is too late now for him to take the objection, especially after fresh steps have been taken. And as to the proceedings being irregular on account of declaring in the original action, they cited *Collett v. Wilson* (b), where the Court said that it did not appear to them how any thing that took place in the original cause after the action against the bail was commenced could be material thereto. Here the declaration was only *de bene esse*.

Archbold, in support of the rule.—The proceedings are clearly irregular, for by declaring in the original action, though it was *de bene esse*, the bail are discharged. No question could ever have arisen upon a declaration in chief, for the plaintiff cannot declare in chief till the defendant has appeared, which is not complete until bail above have been put in and justified. The summons was not served on the bail till the 14th of November, and the declaration against the original defendant was on the 18th; that being a waiver of the proceedings, it was unnecessary for the bail to move till a declaration was served on the 24th, the last day but one of *Michaelmas* Term. An unsuccessful application was made at chambers in vacation, and therefore we are in time with the present application. There is no case precisely in point; but it has been always understood to be the practice, that, by proceeding in the original action, the proceedings against the bail are waived; and the case, which has been cited, of *Collett v. Wilson*, shews that it is contrary to the practice to declare in the original action

(a) Ante, Vol. 1, p. 488.

(b) 4 Taunt. 716.

after proceedings have been commenced against the bail. But upon the other point there are several cases to shew that the bail are discharged by the agreement, whereby time was given to the principal without the consent of the bail. The agreement was at all events partly executed. Notice was given by the plaintiff, that, unless the agreement was fulfilled, he should proceed; in pursuance of which, on the 20th of *October*, two bills, to the amount of 215*l.*, are sent to the plaintiff, which he keeps; he has, therefore, got the additional security of *Richard Turley* as a consideration for staying proceedings, and he therefore cannot proceed against the defendant whilst he retains those bills. *Willison v. Whittaker* (a) is in point for the defendant: there the plaintiff, having got judgment against the principal, consented to receive from the defendant three bills of exchange, accepted by the defendant's father, at 4, 8, and 12 months, for the amount of the debt and costs. The bills were given, but not paid, and yet it was held that the bail were discharged. *Gibbs*, C. J., says, the defendant has procured a surety to accept bills, and those bills being payable at a future day, the defendant has purchased the privilege of being free from arrest until it be seen whether the bills will be paid or not. He has given, therefore, consideration for his freedom from arrest for a certain time, and until that is expired the plaintiff could not take him; and that being so, according to the doctrine of all the cases, the bail are discharged. In the recent case of *Hannington v. Beare* (b) the same doctrine was laid down; and Lord *Abinger* says, "the question is, not whether the bail have been damnified, but whether time has been given to the principal without the consent of the bail." Here the taking two bills of exchange suspended the plaintiff's right to proceed, and the bail are discharged.

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(a) 7 Taunt. 53; 2 Marsh. 383.

(b) Ante, p. 256.

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LORD ABINGER, C. B.—I am of opinion that the proceedings are regular, and also that time has not been given to the principal so as to discharge the bail. The agreement was with *Richard Turley*, conditional upon *James Turley's* entering into an agreement, which in point of fact he never did enter into.

PARKE, B.—I am also of opinion that the proceedings are regular, and that the plaintiff, by declaring *de bene esse*, did not waive the process issued against the bail. If he had declared in chief, it would have been a waiver; but there is no inconsistency in declaring *de bene esse* in the original action: the object of it was to shew that he had lost a trial. I am also clearly of opinion, that no case has been made out of time given to the principal. *Willison v. Whittaker* is not in point; that was a single insulated transaction of bills given for the debt, from which an implied agreement to stay proceedings was presumed. Here there was a special agreement, and only part of it was performed: and even supposing that the agreement did operate as a giving of time, this application is too late. The bail should come in a reasonable time after they know of the agreement to give time. This motion should have been made in *Michaelmas* Term, as there was plenty of time for the purpose in that term, after the summons was served.

BOLLAND and GURNEY, Bs., concurred.

Rule discharged.

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VERNON, Assignee, &c., v. HODGINS.

THIS was an application to set aside an interlocutory judgment with costs, for irregularity. This was an action by the plaintiff, as assignee of the sheriff, upon a bail-bond, signed by the defendant. The defendant pleaded that time had been given to the principal. On the 23rd of *December* the plaintiff demurred. On the 1st of *January* the defendant obtained an order for seven days' time to join in demurrer, and on the 8th another order for four days' further time. On the latter day, notice was given by the defendant of an intended motion to the Court to set aside all the proceedings against the defendant; but the rule *nisi* was not obtained till the 12th, with a stay of proceedings in the mean time, and which after being enlarged was argued on the 25th, and then discharged, with costs (a). On the same day, at seven o'clock in the evening, a joinder in demurrer was delivered; but it was said, that judgment had been already signed; and upon search it was found that it was so.

Where a defendant, on the last day for joining in demurrer, obtained a rule *nisi* for setting aside the plaintiff's proceedings, with a stay of proceedings in the mean time, which rule was afterwards discharged, with costs:—*Held*, that the defendant was in time to join in demurrer, at any time in the day that the rule was disposed of, and that a judgment previously signed by the plaintiff was irregular.

Erle shewed cause, on an affidavit that the plea was not true in fact; and he contended, that as it was pleaded evidently for delay, being clearly bad in point of law, the plaintiff would be obliged to demur to it, and thereby give four days more to the defendant. But he contended that the judgment was regularly signed. The defendant had twelve days to join in demurrer, and on the last day got a rule, staying the plaintiff's proceedings, for which it afterwards turned out that there was no foundation, and the rule was discharged with costs. As soon as the rule was disposed of, the time for pleading being out, the plaintiff was entitled to sign judgment. As a general rule,

(a) See the previous case, p. 660.

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a defendant so circumstanced must, at his peril, take his next step in proper time, otherwise he would take advantage of his own wrong by getting more time, in consequence of an improper motion, which he ought not to be allowed to do. Even if the plaintiff gets costs, it is no indemnity to him for having been delayed by an unfounded rule; and this was the view taken by the Court in *St. Hanlaira v. Byam* (a), and seems a much sounder and more reasonable doctrine than that which is said to have been held in *Hughes v. Walden* (b). Here, the plea put in is of the very facts on which the Court decided in *Vernon v. Turley* (c), holding that the bail were not discharged; the last four days' further time (it is sworn) were granted by *Bolland, B.*, upon a supposition that these facts, at most, only afforded a ground for an application to the equitable jurisdiction of the Court, and were not the subject of a plea; this was asserted by the defendant's attorney, as a ground for getting more time; it was admitted then that it was a sham plea, pleaded to gain time, and they obtained four days, because the facts could not be pleaded; the Court have since decided that there was no pretence for the motion, and that nothing has been done to discharge the bail; and yet the defendant persists in his plea, and wishes to have the judgment set aside, that he may join in demurrer.

Archbold, in support of the rule.—The affidavit used on the other side has been improperly introduced. This is a motion to set aside a judgment for irregularity, and the only question is, whether it was signed too soon. If the plea was improperly pleaded, it should have been made the ground of a substantive motion to set it aside; the defendant would then have had an opportunity of

(a) 7 D. & R. 458; 4 B. & C. 970.

(b) 5 B. & C. 770.

(c) Ante, p. 660.

answering the affidavit, which must, therefore, be left out of the case. With respect to the irregularity of the judgment, by the practice of this Court, after a rule with a stay of proceedings has been disposed of, the defendant has the same time for taking the next step as he had at the time the rule was applied for. *Swayne v. Crammond* (a) is an express authority, that a rule for setting aside proceedings for irregularity, with a stay of proceedings in the mean time, is, till disposed of, an absolute stay of all proceedings for all purposes; and that, though it is discharged, the defendant has the same time for taking the next step as he had when the rule *nisi* was granted. In the subsequent case of *St. Hanlaire v. Byam* (b) it certainly was held, that the staying of proceedings applies only to the adverse proceedings of the plaintiff, and not to the proceedings of the defendant for his own security; and that, if he (the defendant) did not act whilst the rule was pending, he at all events ought at his peril to take the next step immediately after the discharge of the rule, though his time was not expired when the rule was moved for. It is observable, however, that in that case *Swayne v. Crammond* was not adverted to; and in *Hughes v. Wulden* (c), which is the last case on the point, a new rule was laid down after a consideration of the previous cases, that where a defendant obtains a rule which stays the plaintiff's proceedings, he is not entitled to the same time for the purpose of taking the next step as he had when he obtained the rule, but that he is entitled to a *reasonable* time; and that the whole of the day on which the rule is disposed of is to be considered a reasonable time. According to that case, the judgment was clearly signed too soon, for the joinder in demurrer was tendered on the evening of the very day that the rule was dis-

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(a) 4 T. R. 176.

(b) 7 D. & R. 458; 4 B. & C. 970.

(c) 5 B. & C. 770.

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posed of, and we were told that the judgment was signed on the previous evening. The rule laid down in *St. Hanslaire v. Byam* was found to be productive of great inconvenience; for why should the defendant, whilst the rule is pending, be bound to take a step which, if the rule was made absolute, would be of no use, and only occasion unnecessary expense; and if delayed till the rule is disposed of, it would be scarcely possible to effect it in time. The defendant has a right to have the facts stated in the plea put upon record; and if the joinder in demurrer had been accepted, the plaintiff would have been in time to have had the demurrer argued within the term.

LORD ABINGER, C. B.—I think the judgment was irregular upon the authority of *Hughes v. Walden*, decided in the Court of *King's Bench*; but as it is a doubtful point, and the first time that the rule has been applied in this Court, the rule will be absolute, but without costs.

PARKE, B.—We cannot look at the plea upon this motion: that will be disposed of upon the demurrer. I also think that the judgment is irregular, and that the last decision ought to be abided by; but the second case appears to me to be more consistent upon principle, and that the defendant should apply for time if he wants it; but upon the last case of *Hughes v. Walden*, the rule must be absolute.

BOLLAND and GURNEY, Bs., concurred.

Archbold.—According to the last case, we have the whole of this day to deliver a joinder in demurrer.

PARKE, B.—It must be delivered before eight o'clock.

[It afterwards appeared that there were not four clear

days left in the term, so as to get the demurrer set down for argument.]

Rule absolute.

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HODGINS.

CASTLE v. SOWERBY.

HANCE moved to make absolute a rule to compute principal and interest on a bill of exchange. The rule *nisi* was served by leaving a copy at the warehouse where the bill was made payable. It was sworn that there was no other known place of residence or business of the defendant, who had neglected to enter an appearance to the writ, and a *distringas* had therefore been issued.

A rule *nisi* to compute, served by leaving a copy at a warehouse, where the bill of exchange was made payable, but which was shut up at the time:—*Held*, insufficient service.

GURNEY, B., refused the rule.

Rule refused.

NAYLOR v. MOPSEY and Another.

A RULE *nisi* was obtained by *Knowles* for setting aside an order of Mr. Baron *Bolland*, dated the 4th of *January*, instant, and for staying proceedings in the mean time. The order was in these terms:—"Upon hearing the attorneys or agents on both sides, I do order, that, upon payment of 15*l.* and costs, to be taxed and paid on *Thursday* next, all further proceedings in this cause be stayed." From the affidavits in support of the rule, it appeared that the action was brought to recover the sum of 150*l.* upon a bond, in the penal sum of 330*l.*, given by the defendants, conditioned as follows:—"The condition of this obligation is such, that, if the above-bounden *Henry Mopsey*, and *Robert Mopsey*, their respective heirs, exe-

A bond was conditioned to pay 165*l.* by certain instalments until the whole should be paid. But if default was made in paying any one, the obligation was to remain in force.

An action having been brought upon the bond, in consequence of a default in payment of the second instalment, a Judge ordered, that, on payment

of the 15*l.* and costs, proceedings should be stayed:—*Held*, that the Judge had no power to make such order.

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cutors, or administrators, do and shall well and truly pay, or cause to be paid, to the said *Mary Naylor*, her executors, administrators, or assigns, the full sum of 165*l.*, of lawful money of *Great Britain*, on the days and times, and in manner following; that is to say, the sum of 15*l.* on the 6th day of *April* next, and the like sum of 15*l.* on the 6th day of each succeeding sixth month in each and every year, until the whole of the said sum of 165*l.* be fully paid and discharged, then this obligation shall be void. But if default shall be made in payment of any or either of the said several and respective sums of money in manner aforesaid, or any part of them, on any of the said days and times above mentioned for payment thereof, according to the true intent and meaning of these presents, then this obligation is to remain in full force and virtue." The 150*l.* now claimed was the balance of the 165*l.* mentioned in the condition. The defendants had been frequently applied to for the payment of the second instalment.

Bompas, Serjt., shewed cause, upon affidavits that the defendant, *H. Mopsey*, in *August*, 1834, purchased of the plaintiff her interest in certain leasehold premises at a premium of 200*l.* and an increased rent of 30*l.* per annum; that the bond was given to secure the payment of the additional rent of 30*l.* by half-yearly instalments; and that the 165*l.* mentioned in the condition was the aggregate of the additional rents of 30*l.* per annum during the remaining years of the lease; that the first instalment had been paid; and that when the writ was served on the defendants, in consequence of the nonpayment of the second instalment, a summons was taken out to stay proceedings on payment of 15*l.* and costs; and that upon that summons Mr. Baron *Bolland* made the order in question; that the costs had since been taxed, and the 15*l.* and costs tendered to the plaintiff's attorney. It was now contended, that the order

was under the circumstances reasonable and proper, and that the defendant was thereby saved the expense of an unnecessary judgment.

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v.
MORSEY.

Knowles, in support of the rule, contended that the learned Judge had no power to make such an order, as by the terms of the condition the bond had become forfeited.

The Court held, that the plaintiff ought not to have been prevented from getting judgment, for he would have a right to proceed upon it for a subsequent default, by *scire facias*; and they directed that the order should be set aside without costs, the plaintiff to be at liberty to enter upon the record judgment by *nil dicit*, with damages to the amount of 15*l.*, as if they had been assessed before the sheriff upon a writ of inquiry, the defendant to pay the costs of the judgment and entry, &c., and upon the payment of the costs and 15*l.*, satisfaction as to that instalment was to be entered up.

Rule absolute accordingly.

PREEDY v. LOVELL.

JOHN BAYLEY shewed cause against a rule which had been obtained by *Rogers* for setting aside the judgment and subsequent proceeding for irregularity. The ground of the motion was, that the judgment was signed upon a cognovit, which contained an agreement on the part of the plaintiff, that if there was any error in the accounts

On shewing cause against a rule, when an objection is taken to the insufficiency of the affidavits in support of the rule, the counsel shewing cause must at once

elect whether he will use his affidavits in answer to the rule or not.

Affidavits in support of a rule to set aside proceedings must shew a clear case for relief; and, therefore, where it was moved to set aside a judgment on the ground that the accounts between the parties had been investigated and found to be incorrect, and that the plaintiff had agreed that any error should be rectified—*Held*, that the affidavits were insufficient in not stating that the error was in the amount.

Where a rule is discharged on a technical objection taken to an affidavit without going into the merits, no costs are allowed.

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between them it was to be rectified; and it was sworn by the defendant's attorney that he had investigated the accounts, and discovered an error. It was now objected that the affidavit in support of the rule was insufficient—*first*, in being sworn by the attorney as to what he had been informed by the defendant, and that he, the attorney, believed it to be true, instead of the facts being deposed to by the defendant himself; and, *secondly*, in not shewing what the error was, whether in amount or otherwise.

Rogers, contra, answered that it sufficiently appeared by the affidavits against the rule what the error was.

Bayley said, that at present he had not used his affidavits. But *The Court* held, that he must exercise his discretion as to using them or not at once.—*Bayley* declined to use them.

Rogers then contended that the affidavit of the attorney was sufficient. As it was sworn by him that he had investigated the accounts, and verily believed they were incorrect, it must be supposed that the error was in the amount.

PARKE, B.—The affidavit ought to have shown that there was an error in the amount; and, therefore, if the objection is persisted in, the rule must be discharged, but without costs, because the merits have not been gone into.

ALDERSON, B.—The affidavits ought to shew a grievance.

Rule discharged, without costs.

1836.

REX v. The Sheriff of MIDDLESEX, in a Cause of
HAMMOND v. BEAN.

S. HUGHES had obtained a rule *nisi* on behalf of the bail for setting aside this attachment against the Sheriff of *Middlesex*, for not bringing in the body, upon the usual affidavit that it was made at their own expense, and for their own indemnity, and without collusion, and that the defendant had been duly rendered.

Where an attachment has been obtained against the sheriff for not bringing in the body, it is not necessary that bail above, who are afterwards put in for the purpose of rendering the defendant, should justify before such render is made, in order to entitle them to set aside the attachment on payment of costs.

Bayley shewed cause.—From the affidavits in answer, it appeared that the defendant was arrested on the 29th of *December*, and gave bail to the sheriff; and on the 13th of *January* (the body rule having then expired) this attachment was obtained against the sheriff. On the 18th the defendant was rendered by bail above put in for that purpose, and two days afterwards the present motion was made. It was now objected, on the authority of a late case in the Bail Court, of *Rex v. The Sheriff of Surrey*, in a cause of *Stamford v. Berry (a)*, that the render was irregular, on

(a) Not reported. The following are the particulars of the case:—

REX v. The Sheriff of SURREY, in a Cause of STAMFORD v. BERRY.

In the Bail Court, coram LITTLEDALE, J., Michaelmas Term, 1835.

THIS was a rule calling upon the prosecutor to shew cause why upon payment of costs by the defendant (the sheriff) to the prosecutor or his attorney, the writ of attachment and all proceedings thereon should not be set aside for irregularity. From the affidavits it appeared, that on the 10th of *July* a *capias* was issued against the defendant *Berry*, upon which he was arrested on the 11th of the same month, on which day the usual bail-bond to the sheriff was given, and the latter was on the same day ruled to return the writ, to which he returned *cepi corpus*. The rule to bring in the body issued on the 20th. The affidavits then stated an attempt made to justify bail above, which failed; that the defendant kept out of the way, so that the bail could not lay hold of him till the 13th of *October*, on which day two bail entered into a recognizance, who rendered him to prison. On the 4th of *November* the attachment issued against the sheriff for not bringing in the body; on the 7th the coroners of *Surrey*

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account of bail above not having justified; *Littledale, J.*, having decided in that case, that, after the body rule has expired, there can be no render without the bail justifying; and the rule was discharged with costs, and the sheriff fixed with the debt and costs. That case proceeded upon the construction of the rule of the *King's Bench* of *Trinity Term*, 33 *Geo. 3* (a), which, after reciting that "by the present practice of that Court the bail put in for the defendant in any action cannot render such defendant after a rule has been granted against the sheriff to bring in the body before such bail have justified themselves in open Court, it is ordered, that from and after the last day of this term, bail shall and may be at liberty to render the defendant notwithstanding such rule, at any time before the expiration thereof; the attorney for the defendant giving notice of such render to the plaintiff's attorney without

were ruled to return the attachment. There were also the usual affidavits of notice of bail above having been put in, and of the render, and that the application was *bond fide* made on behalf of the *sheriff's officer*, and at his own expense, and for the sole benefit of the sheriff and his officer, and without collusion, &c.

The affidavits in answer shewed that the bail put in were incapable of justifying—that the plaintiff had been delayed in going to trial at the sittings in the term—and that, though the attachment was lodged on the 5th of *November*, and the rule to return it was served on the 7th, this application was not made till the 11th.

John Jervis opposed the rule, and contended that the render, after the expiration of the body rule, was irregular, because the bail had not justified. The rule of Court of *Trinity Term*, 33 *G. 3*, 5 *T. R.* 368, and *Tidd's Practice*, 312, and *Archbold*, 418, were cited.

C. C. Jones was heard in support of the rule.—He cited *Rex v. The Sheriff of Middlesex*, 7 *T. R.* 527, and *Hardwick v. Black*, *Ib.* 297.

LITTLEDALE, J., held, that the render was irregular, and discharged the rule, with costs.

An attempt was made to get the case reheard, but without success, and the sheriff paid the debt and costs.

(a) 5 *T. R.* p. 368.

delay, and making affidavit thereof. The present case is precisely similar in its circumstances to the one cited, except that there the officer was applying, and here the bail are applying.

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Hughes, in support of the rule, was not called upon.

LORD ABINGER, C. B.—There appears to be no reason whatever for such a practice, which would only be productive of useless expense; and therefore I think this rule should be absolute, on payment of costs.

PARKE, B.—What object can there be in making the bail justify, for the purpose of rendering the defendant, in a case like this? The rule of Court which has been cited only shews, that if the defendant is rendered by the bail without justifying at any time before the body rule has expired, an attachment afterwards obtained would be *irregular*, but this is an application to the indulgence of the Court, upon payment of costs. The case cited must have proceeded upon some mistake.

BOLLAND and GURNEY concurred.

Rule absolute, on payment of costs (a).

(a) The objection taken in *Rex v. Surrey* in *Stamford v. Berry*, appears to have come upon the defendant's counsel by surprise; for there are recent cases in the books directly in point against it; *Rex v. Middlesex*, ante, Vol. 1, p. 454, where bail above were rejected after the body rule had expired, and then they rendered the defendant without justifying; and an attachment obtained in the mean time was set aside, on payment of costs; *Rex v. Middlesex*, in *Watts v. Hamilton*, ante, Vol. 2, p. 432, where bail above were put in, and they, without justifying, rendered the defendant on the 2nd of November, and on the 3rd an attachment was obtained, which, on the express rule of M. T. 3 Will. 4, s. 13, was held regular, but was set aside on payment of costs. So, in *Rex v. Middlesex*, ante, Vol. 3, p. 195, no objection was made that the bail had not justified. In *Rex v.*

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Middlesex, in *Henderson v. Van Wrede*, 2 M. & Selw. 562, an attachment obtained after the body rule had expired, but after a render, was held to be *irregular*; in which case, and in *Whitehead v. Phillips*, 2 B. & Ald. 585, the Court held, that a render was equivalent to putting in and perfecting bail. In *Rex v. Middlesex* in *Logan v. Louel*, 6 Bing. 251, it was held, that a render by the bail below, after an ineffectual attempt to justify bail above, was sufficient to enable the Court to set aside an attachment after-

wards obtained. Lastly, in *Wilson v. Griffin*, 2 Cr. & J. 683, where bail above were put in, who rendered the defendant without giving notice to the plaintiff's attorney, the Court set aside an attachment afterwards obtained without costs; Bayley, B., observing, "that as bail above were put in merely for the purpose of rendering the defendant, and as there could be no object in giving notice, it would not be consistent with common sense to hold such notice to be necessary." See also *Mysey v. Carnell*, 5 T. R. 534.

KEMP v. GADDERER.

A plaintiff taking a bill of exchange in payment of the debt and costs of an action, may, upon the bill being dishonoured, arrest the defendant on a *ca. sa.*, without delivering up the bill.

MANSEL moved for a rule calling upon the plaintiff to shew cause why he should not deliver up to the defendant a bill of exchange, or discharge the defendant out of custody. From the affidavit it appeared, that the defendant had indorsed to the plaintiff, in payment of the debt and costs in the action, a bill of exchange for a larger amount, the plaintiff agreeing to pay over the surplus arising from the bill to the defendant. The plaintiff afterwards took the defendant in execution, having the bill of exchange still in his possession. It was admitted that the bill was overdue and unpaid, but it was contended that the plaintiff had no right to take the body of the defendant in execution, and also keep possession of the security.

GURNEY, B. (*a*), after consulting with the other Barons, refused the rule.

Rule refused.

(*a*) Sitting alone.

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BATE v. BOLTON.

SIR W. W. FOLLETT shewed cause against a rule which had been obtained by *Platt* for setting aside a judgment of *nonpros* for irregularity, and that the defendant's attorney should pay the costs. It appeared, that after the rule was made absolute for setting aside a former judgment of *nonpros* signed in this action (*a*), the defendant gave notice to the plaintiff of the second appearance being entered and demanded a declaration, and for want of a declaration again signed judgment of *nonpros*. The question now was, whether the defendant was not at liberty to enter a new appearance, as the first was in a wrong name. It was now contended, that the first appearance could not be altered, the 2 Will. 4, c. 39, s. 2, directing that the mode of appearance shall be in the form given in the schedule, and shall be dated on the day of the entering thereof. The only good appearance is the second, and, the objection of want of notice being now done away, the *nonpros* is regular.

If a defendant enters an appearance in due time, which is irregular on account of a mistake in the name, the proper course for him to pursue is to apply to amend that appearance, and not to enter a new one.

Platt, in support of the rule, contended, that the appearance ought to be entered of the term of which the writ is returnable; but it was expressly said by the Court on the former occasion, that the first appearance should have been altered, and the rule for setting aside the *nonpros* was made absolute, with costs.

PARKE, B.—We think that the opinion expressed by the Court on the former occasion is correct, and that the proper course should have been to apply to amend the old appearance.

Per Curiam (*b*).

Rule absolute.

(*a*) *Bate v. Bolton*, ante, p. 160.

(*b*) Lord Abinger, C. B., and Parke, Bolland, and Gurney, Barons.

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STAINES v. STONEHAM.

A notice of justification of bail at chambers, not specifying the hour, is a nullity; and though a notice of waiver of the first notice, and a fresh notice of justification specifying the time, were served two hours afterwards, yet, being too late—*Held*, that the plaintiff was justified in not attending to oppose the bail.—*Held*, also, that the plaintiff was entitled to move to set aside the allowance of bail, though a Judge at chambers had decided that the proceedings were regular.

Bail may set aside proceedings against them on payment of costs and rendering, without the bail-bond standing as a security, even though the bail become fixed at a time when, by the practice of the Court, no declaration could be delivered.

STEER shewed cause against a rule which had been obtained by *Blackburne*, for setting aside the rule for the allowance of bail, with costs. It appeared that notice of justification at a Judge's chambers was duly given before eleven o'clock on the 17th of *October* for the 20th, but by accident the hour of attending at the Judge's chambers was omitted. At two o'clock on the same day a notice of waiver was served, and also a fresh notice of justification, specifying the hour on the 20th to be eleven o'clock. The plaintiff's attorney did not attend, relying upon the first notice being a nullity for not specifying the time, and the second notice not being served in time; but he gave no notice of his intention to avail himself of the objection, and the bail accordingly attended at the Judge's chambers on the 20th, and a rule for their allowance was obtained. The plaintiff, notwithstanding, proceeded on the bail-bond, and a summons to stay proceedings being taken out was heard before *Park, J.*, at chambers, who consulted *Gaselee, J.*; and those learned Judges were of opinion, that the notice was not a mere nullity, and that the plaintiffs should have attended at chambers and objected; and an order for staying proceedings was made. It was now also contended, that the plaintiff's attorney should have attended and objected, and that the question having been decided by a Judge at chambers, could not now be re-opened. *Rex v. Archbishop of York* (a) was relied on; and *Pugh v. Emery* (b) was cited, to shew that the notice was merely irregular, and not a nullity; but—

The Court held, that the learned Judge at chambers

(a) 1 Ad. & Ell. 394.

(b) 4 D. & R. 30.

ought to have treated the allowance of bail as a nullity, and that the attorney was justified in so treating it; and they made the rule absolute for setting aside the rule for the allowance of bail, without costs.

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Afterwards a rule was obtained for staying proceedings on the bail-bond, on payment of costs, the defendant having been rendered; and the question was, on what terms it should be done. The arrest was on the 2nd of *October*. The plaintiff had not declared *de bene esse*. The assignment of the bail-bond was taken on the 10th of *October*.

Blackburne, for the plaintiff, contended, that, as by the 2 *Will.* 4, c. 39, s. 11, no declaration can be filed or delivered between the 10th of *August* and the 10th of *October*, and, therefore, it was impossible for the plaintiff to have declared *de bene esse*, before he took the assignment of the bail-bond, the rule of Court making the declaring *de bene esse* a condition precedent could not apply to this case; and the plaintiff having, in fact, lost a trial through the defendant's default, the bail-bond ought to stand as a security.

PARKE, B.—The rule is, that the plaintiff, in order to have the bail-bond to stand as a security, must always declare *de bene esse*.

LORD ABINGER, C. B., ALDERSON and GURNEY, Bs., concurred.

Rule absolute, on payment of costs.

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DEFRIES v. SNELL.

Where it appears upon the record that the debt sought to be recovered is under 40s., and that the defendant resides within the operation of a Court of Requests Act, which gives costs to a defendant if the plaintiff proceeds in a superior Court and recovers less than 40s., a suggestion is unnecessary.

BUSBY had obtained a rule *nisi* calling upon the plaintiff to bring the writ of trial and indorsement thereon into Court, and to file the plea roll, so that the defendant might enter a suggestion that the cause of action was under forty shillings, and that the defendant resided within the *Tower Hamlets*, and that the plaintiff might pay costs to the defendant.

J. Jervis shewed cause.—From the affidavits it appeared that the action was *indebitatus assumpsit*, to which the defendant pleaded *non assumpsit* as to 7*l.* 10*s.*; and as to that “payment” and “set-off;” he also pleaded, that the debt did not amount to forty shillings, and that the defendant resided within the Court of Requests for the *Tower Hamlets*, &c. The latter plea, and also the plea of payment, were found for the defendant. On the first plea the plaintiff recovered 1*l.* 6*s.* It was contended that this motion was unnecessary.

PARKE, B.—I think this rule should be discharged, because the defendant may have the same benefit upon the finding of the jury on the last plea, as he would get by a suggestion. Upon that issue the defendant is entitled to his costs, and the costs of this rule should be deducted. The plaintiff must deliver up the writ of trial and *postea* to the defendant's attorney.

Rule discharged, with costs.

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READ v. MASSIE.

BUTT had obtained a rule *nisi* for setting aside a judgment and subsequent proceedings, upon affidavits that the defendant had agreed to give a *cognovit* for such sum (if any) as should be found due by an arbitrator, "the costs to abide the event, and to be paid by the party or parties and at such time as directed by the arbitrator." The arbitrator awarded a sum of money to the plaintiff, and divided the costs between the plaintiff and defendant; but the plaintiff signed judgment for the sum found to be due and also for the costs of the action, after the defendant had tendered the sum awarded. The question was, whether, under the terms of the submission, the arbitrator had power to divide the costs, or whether, as the event was in favour of the plaintiff, he was not entitled to them. The affidavits were contradictory as to what was intended by the parties.

Upon a reference to an arbitrator, "the costs to abide the event, who was to say by whom and when to be paid," he awarded a sum to the plaintiff, and divided the costs between him and the defendant. The plaintiff, treating the award in respect of the costs as void, threatened to issue execution for the debt and costs, upon which the defendant prepared affidavits of the facts (before judgment was signed), and after it was signed made another affidavit of that fact, and moved upon all the affidavits to set aside the judgment:—*Held*, that the first affidavits were good, though sworn before judgment was signed.

Wightman shewed cause.—He took an objection to the affidavits on which the motion was made. They were dated respectively the 14th, 15th, and 16th of *May*, and only one affidavit was made since the judgment, which was not signed till *June* the 2nd, after the affidavits were sworn. He contended, therefore, that the affidavits having been sworn at a time when they could answer no purpose, perjury could not be assigned upon them, because it could not be said that any question had arisen upon which they were material; and that even supposing they might possibly have been made the foundation of some motion to the Court at the time they were made, that of itself could not make them good, nor raise any material question, because at the time they were sworn, they were not sworn with a view to any existing question.

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Butt, contra, contended that perjury might be assigned on them, because they were sworn in the cause; they were sworn with a view to this question, though they were not to be used till necessary. In the first affidavit it is alleged, that "the plaintiff now seeks to issue execution on the *cognovit*, contrary to the agreement between the parties." The statement in the affidavits is consistent with the present state of facts, except that the fact of judgment being actually signed is supplied by a later affidavit.

PARKE, B.—May not a party make an application to the Court, *quia timet*? If in any way the affidavits could be material, it would be sufficient.

The Court (consisting of Lord ABINGER, C. B., PARKE, ALDERSON, and GURNEY, Barons) ultimately admitted the affidavits; and, as it appeared doubtful upon the affidavits what was the real agreement between the parties as to the costs, it was agreed to refer that question to the Master; if they were to abide the event, the rule was to be discharged, with costs; if not, to be absolute, without costs.

Rule accordingly.

RANDALL v. IKEY.

In an action on an attorney's bill, containing several items, some of which the defendant admitted, but

disputed others, on the ground that he had derived no benefit from the work done, the Court refused to allow part of the bills to be referred to the Master, and that the defendant might pay into Court such part as he admitted to be due, on the ground that if the defendant had derived no benefit, it would be an answer to the action on the general issue. The Court also refused to order the plaintiff to give credit for sums received.

HALCOMB moved to stay proceedings, on payment of a sum of money into Court, and that the plaintiff should deliver a debtor and creditor account, with full particulars

of the items for which the action was brought. The action was for a bill of costs; there were two items, amounting to 51*l.*, which the defendant was willing should be referred to the Master. There was another item of 30*l.*, which was charged for conveying an annuity to the defendant, in order to give the defendant a qualification to kill game. The qualification, however, was defective, and the defendant was convicted before a magistrate, and the expenses incurred upon that occasion, amounting to 18*l.*, formed another item in the bill.

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PARKE, B.—It is unnecessary to go further into the particulars, because this Court has no power to order a defendant to give the credit side of the account. It is the invariable practice of the Courts, as well as of the Judges at chambers, never to compel a party to give the credits; and if it be true, as alleged in the affidavit, that costs have been improperly charged for business done, from which no benefit has been derived, that would be a good defence under the general issue; and, therefore, there is no ground for the interference of this Court.

ALDERSON, B.—A Court of equity is the proper Court to apply to, to compel a party to give credits for the sums he has received; the rule must be refused.

Rule refused.

WELSH v. GIBBS.

A RULE *nisi* having been obtained for delivering up the bail-bond to be cancelled, and for entering a common appearance, on the ground that the defendant was a married woman, and that the plaintiff knew her to be so—

A married woman who has put her name to a bill of exchange, as drawer, and is arrested upon it, will not be discharged on motion.

will not be discharged on motion.

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Humfrey shewed cause, upon an affidavit by the plaintiff that he did not know she was a married woman, and that the action was on a bill of exchange against the defendant as drawer. He contended, that this was such a representation by the defendant of her competency to contract, that the Court would not relieve her. He cited *Prichard v. Cowlan (a)*.

Hoggins supported the rule.

Per Curiam.—The rule must be discharged.

Rule discharged, with costs.

(a) 2 Marshal's Reports, 40.

CLARK v. ALLBUT.

Where several actions are depending in different Courts for the same cause of action, though one Court will not allow its proceedings to be dependent on those of another, yet where, in an action for a libel brought in the *Common Pleas*, to which a justification was pleaded, the jury found for the defendant, and a rule *nisi* was then obtained for entering a verdict for the plaintiff on the

special plea, with a farthing damages, on the ground that the justification was insufficient, this Court allowed the defendant in another action here (for the same libel) against other persons, to have further time for pleading until the sittings in the next term, and afterwards again enlarged the time to the following term, in order that the defendant might know the decision of the Court of *Common Pleas*, as to the validity of the plea.

THIS was a rule which had been obtained in *Michaelmas* Term, calling upon the plaintiff to shew cause why the defendant should not have ten days' further time to plead, after a rule in the *Common Pleas*, in a cause of *Clark v. Taylor* had been disposed of. From the affidavits it appeared that this was an action against the proprietor of a newspaper for a libel on the plaintiff, headed "Grand swindling concern," and by the statement the plaintiff was accused of swindling at *Manchester* and *Leeds*. The plaintiff had also brought actions against other newspaper proprietors, one of which was in the *Common Pleas*, and another in the *King's Bench*, both of which had been tried. In the action in the *Common Pleas*, the jury found in favour of the defendant upon the justification; but an

objection being taken to the sufficiency of the plea, the learned Judge put it to the jury to say what damages they would give, supposing the plea to be insufficient, and they estimated the plaintiff's damages at a farthing. A rule *nisi* had been obtained in the *Common Pleas*, to enter a verdict for the plaintiff on the special plea, with one farthing damages, which was still undisposed of, and a similar rule was pending in the action in the *King's Bench*. The object of the present application was to enable the defendants to plead properly to this action, which they could not do, until the Court of *Common Pleas* had considered the sufficiency of the plea. The affidavits also alleged that the plaintiff was an insolvent, and a bankrupt.

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Humfrey shewed cause, and contended that there was no precedent for such a motion. The plea only justified the swindling at *Manchester*, and not at *Leeds*. This is a new action, brought against other parties, and the affidavits alleged that the plaintiff had other evidence, not brought forward on the former occasion, and that he believed he should recover damages from the defendants. It was not pretended that time was wanted for pleading, but the real object of the motion was, that the defendants might know from the decision in the *Common Pleas*, how to frame their pleas; and to grant the rule in the terms prayed for, would suspend the plaintiff's proceedings indefinitely.

Sir *W. W. Follett*, in support of the rule.—In point of precedent there have been many occasions where the Court has stayed proceedings till an action in another Court has been determined. The justice of the case requires that the Court should interfere; for every part of the libel was justified, and the jury found in favour of the defendant. The Judge was satisfied, and said that he should have certified to deprive the plaintiff of costs, if

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the plaintiff had had a verdict with a farthing damages; and there is every reason to suppose that the rule will be disposed of in the next term.

LORD ABINGER, C. B.—I think this is a case in which the Court ought to interfere; but some time must be fixed.

ALDERSON, B.—By fixing a time, the defendant will be induced to act with promptness in the *Common Pleas*; if we leave the time indefinite, we lose all power over the cause.

PARKE, B.—We decide on the ground that it is reasonable that the defendant should have time to plead, until he sees how the rule in the *Common Pleas* is disposed of. The defendant may have time till the sittings after next term.

Rule absolute, on payment of costs, the defendant to have time to plead till the sittings after *Hilary Term*.

In the present (*Hilary*) Term, the case of *Clark v. Taylor*, in the *Common Pleas*, not being yet disposed of, *Wightman* moved for a rule to enlarge the time for pleading in this action till next *Easter Term*, upon an affidavit that an application had been made to the Court of *Common Pleas*, to appoint an early day to hear the case of *Clark v. Taylor*, which that Court refused; that it was not probable the rule would be disposed of this term, but it would most probably come on early in *Easter Term*.

PARKE, B.—There is an objection with some of the Court, against making the proceedings of one Court dependant on those of another.

Wightman.—The plaintiff cannot be hurt, because the defendant is not under terms to take short notice of trial, and therefore the cause cannot be tried till the next sittings.

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The Court granted a rule *nisi*, against which

Humfrey shewed cause; but, on payment of costs,

The Court made the rule absolute; the defendant to have time to plead till the 10th day of *Easter Term*.

KEMP v. HYSLOP and Another.

THIS case was argued at considerable length in *Michaelmas* Term last, by *Busby*, who opposed the rule, and *Bompas*, Serjt., in support of it. The facts of the case and arguments of counsel are omitted, in consequence of their being so fully stated in the judgment of the Court, which was delivered on the first day of this term, by Lord Abinger, C. B. (a), as follows:—

A rule *nisi* was obtained in the last term to set aside an order of my Brother *Bosanquet*, by which the proceedings on a recognizance of bail were set aside as irregular, and cause was shewn. The facts were these:—judgment having been obtained on a trial at *Nisi Prius* in the vacation against the principal, a writ of *capias ad satisfaciendum* was sued out on the 14th of *August*, returnable immediately after the execution thereof, pursuant to the power given by the 3 & 4 *Will. 4*, c. 67, and on

If a writ of *ca. sa.* is sued out against the principal in vacation, returnable immediately after the execution thereof, pursuant to the 3 & 4 *Will. 4*, c. 67, s. 2, with the intention of fixing the bail, and a Judge's order is afterwards obtained in the same vacation for a return of that writ in a certain number of days, under the 15th section of the 3 *Will. 4*, c. 39, the bail ought either to have notice given them of the order, or else the

order, with the writ, should be entered in the public book, four clear days at least before the writ is made returnable by the order: and for want of this, proceedings afterwards taken against the bail were set aside as irregular.

It is recommended by the Court, that when a *ca. sa.* is issued with the intention of fixing the bail, it should be in the old form, returnable in term; and it seems doubtful whether a *ca. sa.* returnable immediately is sufficient for the purpose of fixing bail.

(a) Present, Lord Abinger, C. B., Parke, Alderson, and Gurney, Bs.

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the same day was lodged at the Sheriff's Office, and entered in the public book. On the 12th of *September* the Lord Chief Justice of the *Common Pleas* made an order on the sheriff to return the writ in six days, which was served on him on the 14th, and he returned the writ on the same day, "*non est inventus*." Proceedings were thereupon had against the bail, who applied at chambers to set them aside; and my Brother *Bosanquet*, after taking time to consider, made an order to that effect, being of opinion that the bail were not regularly fixed. The question is, whether this order was right, and we are of opinion that it was. If no Judge's order had been made to return the writ of *ca. sa.*, there can be no question but that the bail would not have been fixed; for the writ of itself would not have been *returnable*, and until then the bail are not liable; and, indeed, it never could have been returnable at all, until the principal had been taken; and then the bail would have been discharged, by the act of taking the principal.

But it is said, that the Judge's order to return the writ has the effect of making it returnable at the time stated in the order; and that time having elapsed, and the writ having been lodged in the office for more than four clear days before that time, the bail are fixed. To this it is answered—*first*, that the Judge had no power to make such an order, and that it is a mere nullity; and, *secondly*, if he had, still the bail have not had the advantage allowed them by law, and are not fixed.

With respect to the Judge's power to issue the order, it was contended, that such power was given, either by the 2 *Will. 4*, c. 39, s. 15; or, by implication, by the 3 & 4 *Will. 4*, c. 67, which first makes a *capias ad satisfaciendum* returnable *immediatè*, and which, by the title, appears to be an act to *amend* the former act; or, *lastly*, that the order was authorized by the general jurisdiction of the Court over its own process. But admitting that

such an order was legal on one of these three grounds, (and we are disposed to think it was a legal order, for the purpose of compelling the sheriff to notify by his return what he had done with the writ), we do not think it can have the effect of altering the time when the writ is returnable; and if it had such effect, we are of opinion that the bail could not be fixed until notice of that order was given to them, or at least until the order was lodged at the sheriff's office, with the writ, and an entry made of it in the public book, and for that more than four days, at least, before the time at which the order made the writ returnable. For if the order has the effect of making the writ returnable at a different time from that at which it was originally returnable, the bail have a right either to be informed when the writ is so made returnable by actual notice, or to have the power of ascertaining it, on the usual search in the office, so as to be able to render their principal before the return day of the writ, (at which time it is a matter of right in them to render their principal), and to have four clear days to enable them to do so.

It may, indeed, be well doubted whether bail *can* be fixed at all, except by process of *ca. sa.* in the old form; and if they could be, it would be productive of much hardship to them. The rule is, that the writ must be in the office four days exclusive before the return day, which should be the last four days; and the bail, being bound to search the office, could protect themselves by an actual search during term, and for four days before it, under the old process. But if the optional process given by the late act, with a Judge's order for its return, is sufficient to fix the bail, they cannot be safe without a perpetual search, *de die in diem*, in the sheriff's office, in vacation as well as in term; and it is very questionable whether the power given by the act could have been intended so materially to prejudice the situation of bail. We cannot help thinking that there is great weight in this objection, and it will

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be well to avoid it in future, by issuing the *ca. sa.* in the old form, returnable in term, in those cases where it is intended to proceed against the bail. In the present case, however, we are of opinion that the bail ought to be relieved, because, even supposing it competent for a plaintiff to proceed to fix bail, by the new form of writ, and supposing the Judge's order to have the effect of altering the time when the writ was returnable, the bail have never been informed, or had the proper means of informing themselves, of the time when the writ was so made returnable.

The rule must therefore be discharged, and it must be with costs.

Rule discharged accordingly.

JENKINS v. TRELOAR.

In an action for tolls on coals brought into a port claimed to be due to the plaintiff by prescription or grant from the crown:—*Held*, that he could not have two counts in the declaration, one claiming the tolls as port duties, and the other as metage fees, and that one of the counts must be struck out, and with costs, unless a Judge should be satisfied that a distinct subject-matter of complaint was intended to be established upon each count, and the usual undertaking given to adduce material evidence on both counts.

THIS was a motion to strike out one of two counts in a declaration.—The action was brought to try the right to tolls on coals brought into the port of *Truro*. The first count claimed them as fees appertaining to the plaintiff's office of meter; the second count claimed them as port duties. This was preparatory to a third trial: the original declaration, which was before the new rules came into operation, contained twelve counts (a). A summons had been obtained for striking out one of the counts, and was attended by counsel; but *Parke, B.*, by whom it was heard, after taking time to consider, refused an order. The Court with difficulty granted a rule *nisi*, against which—

Cowling shewed cause.—He referred to the 3 & 4 *Will.*

(a) See *Jenkins v. Harvey*, 1 Cr. M. & R. 877.

4, c. 42, s. 23, which allows certain amendments to be made upon the record; and urged, that, as that act was passed with a view to the alterations which were then contemplated in pleading, the new rules ought to be construed in connexion with it. Under that section an amendment could not be made in the statement of the plaintiff's cause of action, supposing he were to be confined to one count, which turned out not to be applicable. On the first trial the Court held that it ought to have been left to the jury to say whether the plaintiff's claim was not in the nature of a port duty. Upon the second occasion the Court seemed to consider it to be a metage fee. The new rules were intended to prevent a plaintiff from stating the same subject-matter of complaint in different ways in point of fact; but he is at liberty to state the same complaint in different ways in point of law. The words of the rule are, that counts founded on the same matter of complaint, but varied in statement, description, or circumstance only, are not to be allowed; but a count on a bill of exchange may be joined with a count for the consideration; a count on a policy of insurance, with another for the premium; one count for freight on a charter-party, with another for freight *pro ratâ itineris*: and yet the plaintiff in each of these cases would be entitled to recover only on one count. So here, though the plaintiff could only recover on one count, the subject-matter of complaint in each count is substantially different. The judgment of *Tindal*, C. J., and *Bosanquet*, J., in *Triebner v. Duerr* (a), is in point for the plaintiff.

Crowder, in support of the rule.—The argument on the other side would apply to every case, and leave the plaintiff at liberty always to introduce several counts. Notwithstanding the cause has been twice tried, the plaintiff is still ignorant what the nature of his claim is. It is ad-

(a) 1 Bing. N. C. 266; 1 Scott, 102, S. C.

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mitted he has but one claim against the defendant; and his ignorance of the real nature of his cause of action is the only reason for introducing two counts. The instances cited on the other side are in the nature of exceptions to the general rule. Looking at the numerous instances given by the rules, it is clear that the plaintiff has no right to have two counts. The rule for actions of tort is this: - "In the like actions for misfeasance, several counts, founded on varied statements of the same duty, are not to be allowed." This exemplifies what was intended by the rule in *assumpsit*. Here the two counts contain a varied statement of the plaintiff's claim, which is founded on a prescriptive right, to receive something from the defendant for the benefit he derives from the use of the port.

LORD ABINGER, C. B.—If the rules allowed us any discretion, I should have been disposed to allow both counts; but I do not see how this differs from claiming the same thing under two different supposed contracts, which is expressly prohibited. The rules are peremptory, and I think the present case falls within them.

PARKE, B.—Here there is neither a distinct contract nor a different sum claimed. In both counts it is the same right founded on the same grant of the Crown. It is only a different mode of stating the consideration. Whether an amendment ought not to be allowed, if it should turn out that the count retained is not applicable, is a different question: if it cannot, it is a case of great hardship on the plaintiff.

Crowder applied for costs, and cited *Lawrence v. Stevens* (a). It is expressly sworn that there is but one cause of action.

(a) Ante, Vol. 3, p. 777.

PARKE, B.—The rule says, that the Judge shall order costs, unless he shall be satisfied that some distinct matter of complaint is intended to be established on each count. When the case was before me at chambers, it appeared that a large amount of tolls was claimed upon several cargoes; and it was said by the plaintiff's attorney that he intended to proceed for part on one count, and part on the other count.

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John Bayley, amicus curiæ, mentioned three cases, in which, one of two counts having been struck out, the Judges on each occasion expressed an opinion that they were bound to give costs, and had no discretion.

Cowling objected that the rule did not pray for costs.

LORD ABINGER, C. B.—The learned Judge at chambers did not decide upon the question, whether in point of fact a distinct subject-matter of complaint was intended to be established in respect of each count. As that point, therefore, has not been inquired into, I think the present rule should be absolute for striking out one of the counts with costs, unless the plaintiff shall satisfy the learned Judge, upon application to him, that a distinct cause of action is intended to be established on each count, and the usual undertaking is given.

Rule accordingly.

CHESLYN v. PEARCE.

THIS was a motion for costs of the day for not proceeding to trial pursuant to notice. The question was, whether

A notice of countermand signed "B. B., plaintiff's attorney," is sufficient,

though the name of another attorney is on the record, if the defendant is not misled by it, and the individual signing is really the attorney.

An attorney cannot be ordered to pay the costs of an unsuccessful application to which he is not a party except upon special motion.

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the notice of countermand was sufficient, being signed "*B. Brock*, plaintiff's attorney," the attorney for the plaintiff on the record being *Joseph Cragg*. The notice of countermand was served in the country; and it was contended, in support of the rule, that it should have been signed by Mr. *Cragg*, he being the attorney on the record; or if Mr. *Brock* was agent, he was misdescribed as the attorney, and therefore the notice might be treated as a nullity; and the first rule of *Hilary Term, 2 Will. 4, s. 57*, was cited, which directs that countermand of notice of trial may be given in town or country, unless otherwise ordered by a Judge, the meaning of which, it was contended, was, that the attorney in the country should give notice in the country, and the agent in *London* should give the notice there. On the other hand, several affidavits were produced, in which it was stated, that, though Mr. *Cragg's* name appeared on the record as the attorney, yet that his name was only put on the *London* papers for convenience; that *Brock* was really the attorney, and *Douglass & Cragg* were his agents; that in the course of the cause several notices had been served, signed by *Douglass & Cragg* as agents, and that letters had passed between *Brock* and the defendant's attorney respecting the action, from which it was clear that the defendant's attorney knew that *Cragg* was only agent. *Dennett v. Pass (a)* was cited as in point. It was therefore contended that the rule should be discharged, and the defendant's attorney ordered to pay the costs.

LORD ABINGER, C. B.—We cannot order the attorney to pay the costs without a special motion. I think that the rule should be discharged.

PARKE, B.—The defendant could not have been mis-

(a) 1 Scott, 586.

led. The meaning of the rule cited is, that notice of countermand may be given by the attorney or agent either in town or country.

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The other Barons concurred.

Rule discharged.

White in support of the rule.

Barstow shewed cause.

GREGORY v. HARTNOLL.

ASSUMPSIT.—The declaration claimed 50*l.* for money paid by the plaintiff for the use of the defendant at his request, and 50*l.* on an account stated.

Plea.—*First*, general issue. *Secondly*, as to 34*l.* 1*s.* 4*d.* part of the sum of 50*l.* in the declaration first mentioned, *actionem non*, because he says that the said sum of 34*l.* 2*s.* 4*d.*, parcel &c., was paid by the plaintiff to the use of the defendant in manner hereinafter mentioned, and in no other manner, and upon no other account, that is to say, as to one-sixteenth part or share of the damages and costs recovered against the plaintiff in a certain action on the case, which was prosecuted by *William Arter*, *William Arter* the younger, and *Thomas Arter*, against the plaintiff, in the Court of our lord the king, before the king himself, the same Court then and still being holden at *Westminster*, in the county of *Middlesex*, wherein the said *W. A.*, *W. A.* the younger, and *T. A.*, complained against the plaintiff, the owner of a certain sloop or vessel called the *Commerce*, of which sloop or vessel the defendant, at the time of the loss hereinafter

In *indebitatus assumpsit* for money paid, &c., a plea that the money was paid in respect of the defendant's share of certain damages and costs recovered against the plaintiff as part-owner in a vessel (the defendant being another part-owner) for the loss of goods occasioned by the negligence of the plaintiff's servants, but that in fact the loss was owing to the plaintiff's own negligence:—*Held* bad, as amounting to the general issue. A second plea, that the money was claimed as paid on behalf of the defendant as being part-owner,

but that the voyage was undertaken by the plaintiff on his own account only, was held bad for the same reason.

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mentioned, was a part-owner to the extent of one-sixteenth part or share in respect of the loss of certain goods shipped by the said *W. A.*, *W. A.* the younger, and *T. A.*, on board the said sloop or vessel, to be carried and conveyed in and on board the said sloop or vessel from the port of *Barnstaple*, in the county of *Devon*, to the port of *Bristol*, and which loss the said *W. A.*, *W. A.* the younger, and *T. A.*, in their said action alleged to have happened by and through the mere carelessness, negligence, and improper conduct of the plaintiff, by his servants and mariners; and the defendant, in fact, saith, that the said loss of which the said *W. A.*, *W. A.* the younger, and *T. A.*, in their said action complained, was not wholly caused by and through the carelessness, negligence, and improper conduct of the plaintiff, by his mariners and servants, as in the said action alleged, but on the contrary thereof, the defendant says, that the plaintiff by and through his own personal and wilful misconduct and interference in and about the management and stowage of the said sloop or vessel, contributed to the said loss, and that the same happened by and through the personal and direct fault and wrong doing of the plaintiff. Verification, &c. And for a further plea in this behalf, as to the sum of *34l. 2s. 4d.*, *actionem non*, because he says, that the said sum of *34l. 2s. 4d.* was paid by the plaintiff for the use of the defendant in the manner in the said second plea mentioned, and in no other manner, and upon no other account; and the defendant says, that although true it is that the defendant was the legal owner of one-sixteenth part or share of the said sloop or vessel in the said second plea mentioned at the time the said goods were shipped in and on board the same sloop or vessel as in that plea mentioned, and continued to be such legal owner at the time of the loss in that plea also mentioned, yet the defendant in fact says, that he did not join or concur with the plaintiff and the other part-

owners of the said sloop or vessel in the employment of the said sloop or vessel on her said voyage from the port of *Barnstaple* to the port of *Bristol* in the said second plea mentioned, but that the said voyage was undertaken and carried on for the profit and advantage and at the risk of the plaintiff and certain other persons, separate, apart, and distinct from the defendant, and without his being concerned in or in any way sharing or participating in the said adventure. Verification, &c.

Demurrer to the second and last pleas—for that it does not in any manner appear in and by the said second plea that the loss therein mentioned was wholly attributable to the wilful misconduct and interference of the plaintiff in the matters in that plea mentioned; and for that it is perfectly consistent with the allegations in that plea, that the personal and direct fault and wrong doing of the plaintiff in that plea mentioned was at most a mere error in judgment on the part of the plaintiff, and by no means the result of any wilful tort or malfeasance on his part; and for that the same pleas do not, nor does either of them, contain matter in confession and avoidance of the promise in the declaration, in so far as it relates to the sum of money in the introductory part of those pleas respectively mentioned, nor does either of those pleas give even a colourable right of action to the plaintiff, but each of them on the contrary sets forth only matter in negation of the promise alleged in the declaration, and amounts therefore to the general issue of *non assumpsit*, and is besides contradictory and repugnant in its allegations in this, that it commences by alleging that the money therein respectively specified was paid to the use of the defendant, and proceeds with averments in direct contradiction thereto; and for that the said third plea does not shew any contract or other matter whereby the plaintiff was excluded from being concerned and in sharing and participating in the said adventure; and for that the pleas tend to unnecessary prolixity, &c.

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Crowder, in support of the demurrer.—The principal objection to the plea is, that they do not admit that the money was paid to the use of the defendant. This would formerly have been clearly a ground of demurrer; and the new rules have not altered the law in that respect. In *Solly v. Neish* (a) it was held, that a plea which amounted to a traverse of the promise to the plaintiff was bad on demurrer, as amounting to the general issue. Here, the plea amounts merely to a traverse of the promise alleged in the declaration. In *Carr v. Hinchliffe* (b), *Bayley, J.*, states the instances where the general issue or a special plea may be pleaded, to be—*first*, where the plaintiff's right of action is confessed and avoided by matter *ex post facto*; and the other is, where the plea does not deny the declaration, but answers it by matter of law. The present plea is neither the one nor the other.

Montague Smith was then called upon by the Court. The plea confesses a *prima facie* right in the plaintiff to recover. Under the new rules, the general issue does not deny an implied *assumpsit*. The promise is a mere inference from facts, and the general issue was intended to be confined to a denial of facts. The first plea admits that the plaintiff and defendant were part-owners of a vessel, and the recovery of damages against the plaintiff as owner; that shews a *prima facie* case for the plaintiff against the defendant: then the plea alleges new facts confessing and avoiding it. Formerly, many pleas in trespass were obliged to give implied colour to the plaintiff: here there is real colour. *Helme v. Smith* (c) shews that an action lies by one part-owner of a ship against another for his share of the expenses of fitting out the vessel, without any agreement on his part. The plea shews that

(a) Ante, p. 253.

(b) 4 B. & C. 551; 7 D. & R. 45, S. C.

(c) 7 Bing. 709; 5 M. & P. 744, S. C.

the recovery against the plaintiff was in respect of the loss of certain goods, alleged to have been occasioned by the carelessness and negligence of the plaintiff's servants and mariners. The servants of one are the servants of both. If the plea admits a *prima facie* liability, and then states facts to avoid it, it is sufficient. In *Roffley v. Smith* (a) it was held at *Nisi Prius*, that the defendant could not give in evidence that the goods were of such bad quality that they were useless without specially pleading it. [*Parke, B.*—Lord *Denman's* opinion in that case was overruled in *Cousins v. Paddon* (b).] But even if the defence might be given in evidence under the general issue, it may also be pleaded as being matter of law (c). *Carr v. Hinchliffe* is rather in favour of the defendant, for there the plea was held good. With respect to the last plea, the same argument applies: it states a new fact, which destroys the legal inference arising from the defendant being a part-owner.

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LORD ABINGER, C. B.—These pleas appear to me to be bad, as amounting to the general issue. It is important to keep up the distinctions in pleading.

PARKE, B.—The case has been ably and ingeniously argued. The first special plea is bad, because it does not shew that the money was paid at the defendant's request, or under circumstances from which that can be implied. It is no plea except on an admission that the money was paid to the defendant's use. The first and third of the rules of "Pleading in particular actions" embrace all cases in *indebitatus assumpsit*; and if not within them, the defence cannot be pleaded, but must be proved under

(a) 6 Carr. & P. 662.

(b) Ante, pp. 492, 493.

(c) Bac. Abr.; Skin. 362; *Birch v. Wilson*, 2 Moo. 274.

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the general issue. The other plea does not admit a joint contract, and therefore does not admit an implied right in the plaintiff to recover.

BOLLAND, B.—The pleas do not sufficiently confess and avoid.

GURNEY, B., concurred.

Judgment for the plaintiff.

FOSBROOKE v. HOLT.

The defendant will not be allowed to enter a suggestion on record to entitle him to double costs, if the plaintiff is willing to give him double costs without.

CRESSWELL had obtained a rule *nisi* for setting aside the Master's allocatur of single costs, and that the defendant might be at liberty to enter a suggestion to entitle him to double costs under the 7 Jac. 1, c. 5. The defendant was sued in trespass as a magistrate, and the plaintiff discontinued the action.

Hoggins shewed cause.—He did not dispute the right of the defendant to double costs, but opposed the rule on two grounds—*first*, that the defendant having had single costs taxed by the Master, had thereby waived his right to double costs; and, *secondly*, that the double costs had, before this rule was moved for, been tendered by the plaintiff; but the defendant objected to receiving them, unless a suggestion was entered on record, to which the plaintiff objected, as it might prejudice him in another action. The cases of *Devenish v. Martin* (a), and *Vincent v. Strode* (b) were cited.

Cresswell, in support of the rule, contended that, even

(a) 2 Barnard. K. B. 373, 432, 449; 2 Str. 976, S. C.

(b) B. N. R. 591.

if it were unnecessary to enter a suggestion, the defendant was entitled to have one entered for his own security. It would not otherwise appear on record that the defendant was a magistrate. The taxation of single costs was through inadvertence, and notice of the mistake was immediately given to the other side, and double costs claimed.

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LORD ABINGER, C. B.—I think the rule should be discharged with costs, as the plaintiff had offered to pay double costs.

PARKE, B.—I doubt whether a suggestion was at all necessary in this case. If the defendant was entitled to have double costs under the statute of *James*, the Master might tax double costs in the usual way. But, without giving any opinion upon that point, or upon the question whether the defendant did not waive his right to double costs by having single costs taxed to him, I think it is a sufficient ground for discharging this rule, that the plaintiff was willing to give double costs without a suggestion. This motion was therefore unnecessary.

BOLLAND and GURNEY, Bs., concurred.

Rule discharged, with costs, the defendant undertaking to allow the Master to tax double costs.

— *See Doe d. Earl v. Alderson. 6 D.L. 253.*

DOE d. EARL FALMOUTH v. ALDERSON.

Filed 1. M. & H. 10.
JUDGMENT by default had been signed in this action for insufficiency in the consent rule. Leave had In ejectment for a mine and land in Cornwall, the defendant cannot defend for a right of entry to dig for mines, and take the mineral known there by the name of "tin-bounds."

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been given to amend, but the lessor of the plaintiff still objected to the form of the consent rule, and again signed judgment. A rule *nisi* for setting aside the latter judgment for irregularity having been obtained—

Butt shewed cause.—The ejectment is for a mine and the land above. The consent rule was in these terms :—
 “The premises are admitted to consist of certain tin-work bounds, situate in *Belseuden Beacon, or Beaken Bounds, or Common*, containing forty-eight acres, or thereabouts; and also containing a certain tin mine under the same, together with a liberty and right to dig and search for tin within the limits of and under the said bounds, being parcel of the premises mentioned in the declaration.” This is a proposal to defend for an easement. All that the defendant claims is a right to enter and mark out the boundary. The defendant cannot defend for an easement; he must defend the possession of the premises, or part of them.

Manning, in support of the rule.—“Tin-bounds” is not a mere easement. In *Jenkins v. Penn* (a), to trespass for breaking and entering certain lands, the defendant justified under certain “tin-bounds,” to which the plaintiff replied *de injuria*, and it was found for the defendant. He also cited *Rowe v. Brenton* (b), where the nature of the “bounds” was described. If the defendant has not the exclusive possession, he has, by the custom of the country, a limited right, for which he ought to be allowed to defend; and as he is obliged by the recent rules to defend for all specified in the consent rule, it would be hard to be obliged to insert in the rule a greater right than he claims.

(a) Year Book, Hen. 8.

(b) 3 Man. & R. 214, n. (a).

Lord ABINGER, C. B.—The defendant does not claim a right to take the herbage.

PARKE, B.—He has no possession of the surface. It would be sufficient to maintain trespass if any one were to break into the defendant's mine from an adjoining one. Why cannot the defendant defend for a mine within certain bounds? I think that the consent rule must be amended; and for that purpose the judgment may be set aside on payment of costs.

Rule accordingly.

WEST v. SMITH.

CASE.—The declaration, after the usual inducement of good character, averred that the said plaintiff, before and on the 8th day of *February*, A. D. 1835, was possessed of a certain stack of corn, to wit, a stack of barley, of the goods and chattels of the plaintiff, of great value, to wit, 55*l.* 2*s.*, and had, for security, caused the same to be insured against fire, by a certain insurance society or company, to wit, *The Norwich Union Fire Insurance Society*, and at the time of the loss hereinafter mentioned the same was, by the said society, insured for the plaintiff's benefit against fire; and whereas also, on the said 8th day of *February*, A. D. 1835, the said stack of barley was burnt and consumed by fire, without the default of the plaintiff; whereupon the plaintiff afterwards, to wit, on the 18th day of *February*, in the year aforesaid, became and was entitled to receive and was paid on that day the said sum of 55*l.* 2*s.*, as and being the full value of the said stack, by the said society, by virtue of the said insurance; yet the defendant, well knowing the premises, but contriving and intending to injure the plaintiff, and to cause it to be believed that the plaintiff had wilfully and feloniously set fire to the said stack, with intent to

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A declaration in case for words, "that the plaintiff had set fire to his own barley-stack," averred that the stack was insured, and was burnt without his own default, and that the defendant spoke the words of and concerning the plaintiff and the fire:—*Held*, bad on demurrer.

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defraud the said insurance society, contrary to the statute in such case made and provided heretofore, to wit, on the 4th day of *April*, A. D. 1835, in a certain discourse which the said defendant then had, in the presence and hearing of divers persons, of and concerning the plaintiff, and of and concerning the said fire, falsely and maliciously, in the presence and hearing of such persons, spoke and published of and concerning the said plaintiff and of and concerning the said fire, these false, scandalous, malicious, and defamatory words following, that is to say, "*West* (meaning the plaintiff) is as likely a man as any one to set fire to his own barley-stack. A Tom-and-Jerry-shop is to be opened in my (meaning the defendant's) parish, and the sign I (meaning the defendant) shall have painted is a barley-stack on fire, with a man in the middle of it, (thereby meaning that the plaintiff had unlawfully, wilfully, and feloniously set fire to his said stack, with intent thereby to defraud the said insurance society, contrary to the said statute). And afterwards, to wit, on the 3rd day of *October*, A. D. 1835, in a certain other discourse which the said defendant then had, in the presence and hearing of one *William Gray*, and of divers other good and worthy subjects of this realm, of and concerning the plaintiff and of and concerning the said fire, he the said defendant, further contriving and intending as aforesaid, then in the presence and hearing of the said *William Gray* and other the last-mentioned subjects, falsely and maliciously spoke and published of and concerning the said plaintiff and of and concerning the said fire, these other false, scandalous, malicious, and defamatory words following, that is to say, "*West* (meaning the plaintiff) set fire to his own barley-stack, thereby meaning that the plaintiff had unlawfully, wilfully, and feloniously set fire to his said stack, with intent thereby to defraud the said insurance society, contrary to the said statute). The declaration concluded with the usual general damage, and alleged as special

damage, that the *Norwich Union* had refused to insure the plaintiff's farming stock, &c.

General demurrer and joinder.

The grounds of demurrer stated in the margin were, that the words spoken impute no offence, and are not sufficiently connected with the introductory averments to warrant the innuendoes; that the stacks appear to have been the property of the plaintiff; and that the words do not refer to any insurance, nor does it appear that the defendant had any knowledge of an insurance.

Kelly, in support of the demurrer, relied upon *Day v. Robinson* (a).

R. V. Richards, *contra*, cited *Roberts v. Camden* (b); but he elected to amend, Lord *Abinger*, C. B. and *Parke*, B., expressing an opinion, that it was difficult to distinguish this case from *Day v. Robinson*: the latter added, that, but for that case, he should have thought the innuendo might have been rejected.

Leave to amend granted.

(a) 4 Nev. & Mann. 884.

(b) 9 East, 93.

LANE v. THELWELL.

ASSUMPSIT.—The declaration alleged, that whereas the defendant, on the 24th day of *October*, A. D. 1835, was indebted to the plaintiff in 20*l.*, for goods sold and delivered by the plaintiff to the defendant, at his request, &c.

A count for goods sold, not stating any time when the goods were sold, is sufficient even on special demurrer.

Demurrer to so much of the declaration as relates to the goods alleged to have been sold and delivered, for not

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stating any time when the goods were sold and delivered, and that the time when the said goods were sold and delivered ought to have been stated with certainty, &c.

Joinder in demurrer.

Addison, in support of the demurrer, cited *Spyer v. Thelwell* (a) and *Ferguson v. Mitchell* (b), as express authorities that the omission to insert time in an account stated count is fatal on demurrer. The short forms, known as Lord *Tenterden's* forms, state the count for goods thus—"for the price and value of goods *then* and there sold and delivered." So in *Com. Dig. Pleader*, c. 19, it is laid down, "that the time of a matter charged in a declaration ought to be certainly alleged; and therefore, in *assumpsit*, if the plaintiff omits the day when the promise was made, it is bad; so in *trover*, if he omits the time of the conversion; so, the time of every fact material to maintain the declaration." Then is the sale of the goods a material fact? It is the consideration for the promise, and therefore material to be shewn. [*Parke, B.*—The old form of the account stated count always had the words "then and there;" but the words "before then" were the only statement of time given to the sale of the goods, which words really do not fix any time. But do not the terms of the count import that the goods were delivered at the time of the promise? And if the old form of pleading did not specify time, why should it be required now?] In a case of a plea of payment in the *King's Bench* this term, (*Mee v. Tomlinson*), the Court went contrary to the old practice, holding that the plea must specify to how much of the sum in each count the plea was pleaded. [*Parke, B.*—My Brother *Patteson* has told me that he is not satisfied with that decision (d).] If the sale of the goods is a material fact, as it must be admitted to be,

(a) Ante, p. 509.

(b) Ante, p. 513.

(d) *Marshall v. Whiteside*, 1 M. & W. 191.

some time ought to be given. *Trevor v. Wall* (a), *Peacock v. Bell* (b), *Dennis v. Richardson* (c).

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Busby, contra.—The short forms were merely given with a view to save costs, and were not intended to introduce a new mode of pleading: that appears from the rule which accompanies the forms. The form of the account stated count is peculiar; it depends upon a single fact, viz.—the account which has been had between the parties of various sums then due; but the count for goods admits of proof of several deliveries, which may have been the reason of holding the general words “before then” a sufficient statement of time: for those words of themselves are too general as a technical averment of time; and without those words the count shews that the goods must have been delivered at the time of the promise. The authorities cited from *Com. Dig.* are not in point, and another case is there cited where the day stated being repugnant, and therefore rejected, it was held that the word “*postea*” was a sufficient averment of time.

Addison.—In that case there was no special demurrer.

Lord ABINGER, C. B.—I am of opinion that the object of the new forms was not to make that necessary which was not so before, but rather to check the necessity of such a detail of pleading as was formerly in use. Supposing it to be correct to say, that the defendant is indebted for goods “before that time” sold and delivered, then I think the form of the present count is unobjectionable; indeed it is admitted that the same objection applies to those words; and yet that form of count has been in use at least since the time of *Charles 2*; and there is no reason why greater certainty should be required now than

(a) 1 T. R. 151.

(b) 1 Saund. 73.

(c) 14 East, 291.

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was necessary then. Under the count for goods sold, you may give in evidence several different deliveries of goods, and therefore the form is properly left general; but one who is indebted on an account stated, became so indebted at one particular time. I take this declaration to mean the same as a declaration in the old form, and that the new rules have made no alteration.

PARKE, B.—I am entirely of the same opinion. According to the old form, (which was admitted in *Peacock v. Bell*, in 1620, to have been then in established use), it was not necessary to give any particular time when the goods were sold or money lent, &c.; and the reason may have been, that the plaintiff was entitled to recover on several different transactions of sales of goods or loans of money, &c., and therefore the time was left general. I see no reason to depart from the distinction which has always prevailed between the account stated count and the other general *indebitatus* counts; because the former points to one isolated transaction—the statement of the amount. I look upon the present count to mean the same as if the words “before that time” had been introduced. All that the rules of Lord *Tenterden* direct is, that the pleadings shall not exceed a certain length; the forms were only given as examples; those rules had not the force of an act of parliament, as the recent rules of pleading have.

BOLLAND and GURNEY, Barons, were of the same opinion.

Judgment for the plaintiff.

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STRIDE, Assignee of the Duke of WELLINGTON, v. HILL
and Others.

THIS was an action on a bail-bond. A rule *nisi* was obtained by *Channell* for setting aside proceedings on payment of costs, the defendant having been rendered in discharge of his bail; against which—

Busby shewed cause.—This is an action against the original defendant and his two bail jointly. The application is on behalf of the two bail only, and the affidavits therefore should have been intitled in the original action, as there is no irregularity complained of. [*The Court* overruled this objection, holding that the affidavits might be intitled in either action.] *Secondly*, the original defendant does not apply, but only the bail. They have no right to require the proceedings to be stayed as against the defendant himself, over whom the Court has no power, he not being before the Court.

PARKE, B.—It is the constant practice to do so. If you stay the action against the bail, you in effect stay it as against all. The bail are entitled to be relieved: they have complied with the rule of Court, and swear that it is for their own indemnity only that the application is made.

Busby.—The bail-bond ought to stand as a security, as the plaintiff declared *de bene esse*.

Channell, contra, contended, that the plaintiff ought to shew that he had lost a trial before this motion was made, which was on the third day of term. From the affidavits which set forth the dates of the different proceedings, it appeared that the plaintiff could not have tried before the rule was moved, though at the time cause was shewn

In an action against the defendant and bail, on a bail-bond, the affidavits in support of a rule for setting aside proceedings may be intitled either in the original action, or in that against the bail.

Though the defendant is sued jointly with the bail, proceedings in the action may be stayed on the application of the latter only.

To have the bail-bond stand as a security, it must appear that a trial was lost at the time of moving for the rule.

Semble, that *Dover Castle* is the county gaol (upon an arrest in the *Cinque Ports*) to which to render a defendant, within the 11 *Geo. 4* & 1 *Will. 4*, c. 70, s. 21, and *R. G. Exch. Mich. T. 1 Will. 4*, reg. 12.

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against the rule the action would in due course have been tried. It also appeared that some delay had been occasioned by a doubt as to the regularity of the defendant's render. He was arrested in the *Cinque Ports*, and in the first instance had been rendered to the custody of the keeper of *Dover Castle*; and upon application to *Bolland, B.*, at chambers, on the 7th of *January*, to stay proceedings on account of the render, it was objected by the plaintiff that the 11 *Geo. 4* & 1 *Will. 4*, c. 70, s. 21 (a), and the rule of Court thereon (b), did not apply to this case; that it was a *casus omissus*, and that the render ought to have been to the prison of the Court. His Lordship having some doubt about it, refused to interfere, and the defendant was in consequence removed by *habeas corpus*, and rendered to

(a) Which enacts, that a defendant who shall have been held to bail upon any mesne process issued out of any of His Majesty's superior Courts of record, may be rendered in discharge of his bail, either to the prison of the Court out of which such process issued, according to the practice of such Court, or to the common gaol of the county in which he was so arrested; and the render to the county gaol shall be effected in the manner following, that is to say, &c.; and the sheriff, or other person responsible for the custody of debtors in such county gaol, shall, on such render so perfected, be duly charged with the custody of such defendant, and the said bail shall be thereupon wholly exonerated from liability as such.

(b) R. G. Ex. M. T. 1 *Will. 4*, r. 12, which directs, that on application by a defendant or his bail, or either of them, for an order of one of the Barons of this Court

to render a defendant to a county gaol, it shall be specified on whose behalf such application shall be made, the state of the proceedings in the cause, for what amount the defendant was held to bail, and by the sheriff of what county he was arrested, which facts shall be stated in the order; and that on such order being lodged with the gaoler of the county gaol in which such defendant was so arrested, the defendant may be rendered to his custody in discharge of the bail; and that on such lodgment and render, a notice thereof and of the defendant's being actually in custody thereon in writing, signed by the defendant or his bail, or either of them, or the attorney or agent of any or either of them, shall be delivered to the plaintiff's attorney or agent, and thereupon the bail for the said defendant shall be wholly exonerated, without entering any exoneretur.

the custody of the Warden of the *Fleet*, in discharge of his bail, on the 11th.

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PARKE, B.—No trial had been lost on the 3rd, and if bail had been put in in due time, no trial could have been had before the rule was moved; and the rule is, that you must have been prevented from trying at the time of the application. It rather appears to me, that that clause of the act was intended to apply to all cases of render, and that *Dover Castle* must be considered the county gaol of the *Cinque Ports*, or in the nature of the county gaol.

BOLLAND, B.—I thought, when the case was before me at chambers, that the words “county gaol” did not apply to the *Cinque Ports*; that it was a *casus omissus*, and that I could not go out of the words of the act.

ALDERSON, B.—It is unnecessary for the Court to decide that question, as it does not appear that a trial had been lost at the time this application was made.

Rule absolute, on payment of costs.

PENPRASE v. CREASE.

BUTT applied for a rule *nisi* to compel the plaintiff to give better particulars of demand, with a view to the defendant's paying money into Court. An account between the parties had been running for eight or nine years, and the particulars of demand was for one side of the account only, no credit being given for any of the sums received by the plaintiff during that time.

The Court will not compel a plaintiff to give credit in his particulars for sums received.

PARKE, B.—It is a well-settled rule that you cannot compel the plaintiff to give credit.

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ALDERSON, B.—The defendant is in effect applying for a bill of discovery without the guards which a Court of equity always interposes.

Rule refused.

HALL v. JONES, Esq., Sheriff, &c.

A sheriff, against whom an action for falsely returning that money deposited with him by a defendant in lieu of bail had been paid into Court, had been brought, was allowed to pay into Court in the original action the money so deposited, though the plaintiff had been delayed two months by the sheriff's neglect.

A RULE *nisi* had been obtained on behalf of the defendant, to authorize him to pay into Court the money deposited with him by the defendant in lieu of bail in a suit of *Hall v. Champneys*.

W. H. Watson shewed cause upon affidavits, that the defendant (*Champneys*) had been arrested in *October*, and that the sheriff having been ruled to return the writ, had made a return on the 16th of *November* that the defendant had been arrested and had deposited the debt and 10*l.* for costs, which had been paid into Court by the sheriff. The latter had been since applied to to pay it in, but had neglected so to do, and the plaintiff had commenced an action against him for a false return. It was contended, that the sheriff, having delayed the plaintiff for two months, was not entitled to this rule; or that, at least, the money ought to be paid to the plaintiff.

PARKE, B.—There is a difficulty in ordering the money to be paid to the plaintiff; that must be the subject of a separate application. The sheriff may pay in the money in the action of *Hall v. Champneys*, for the purpose of cutting down the damages in the action against himself for a false return, upon payment of costs; and if the latter action is discontinued, the sheriff must pay the costs of that also.

Rule accordingly.

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HALL v. CHAMPNEYS, Bart.

W. H. WATSON had obtained a rule *nisi* for setting aside a demand of declaration, with costs. The defendant having been arrested, had deposited with the sheriff the amount of the debt, and 10*l*. for costs; and afterwards, instead of putting in special bail, had paid into Court, under a Judge's order, 10*l*. additional for costs, pursuant to the 7 & 8 Geo. 4, c. 71, s. 1, and entered a common appearance. The objection was, that the money deposited had not been paid into Court, and also that the defendant was too early in making the demand.

A defendant, who deposits money with the sheriff in lieu of bail, is not in Court, so as to demand a declaration, until the money is actually paid into Court, though the sheriff has returned that he has paid in the money, and the plaintiff has consented to the defendant's entering a common appearance and paying into Court the additional 10*l*. under the 7 & 8 Geo. 4, c. 71, s. 1.

Chandless shewed cause, on an affidavit that the plaintiff's attorney, knowing that the sheriff had not paid the money into Court, had consented to the following order being drawn up:—"Upon hearing the attorneys, &c., I order that the defendant shall be at liberty within one day to pay into Court the sum of 10*l*., making, with the sum of 9*4l*. 7*s*. 1*d*., and 10*l*. for costs, deposited with the sheriff of the county of *Carnarvon*, in lieu of bail upon the arrest, and returned by him as paid into Court, the amount required to be deposited by the statute of 7 & 8 Geo. 4, c. 71, s. 1, to abide the event of the suit, in lieu of perfecting bail. And I further order, that the said defendant enter a common appearance forthwith." In pursuance of that order, the defendant entered a common appearance, and paid the additional 10*l*. into Court. It was contended therefore, that the effect of that order was to bring the defendant into Court, so as to be obliged to receive a declaration, and that the plaintiff therefore ought to be bound to deliver one. The affidavits further stated, that the sheriff was ready to pay in the money, but that the plaintiff had brought an action against him for a false return. The plaintiff, therefore, it was argued,

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had, as far as the defendant was concerned, treated him as in Court, and was not at liberty now to deny it.

PARKE, B.—The question is, what was meant by the order? It is too much to say, that the effect of that order was to make it obligatory upon the plaintiff to go on, though the money was not paid into Court.

Lord ABINGER, C. B.—I am of the same opinion. The defendant might have made it part of the order that the plaintiff should go on forthwith.

Rule absolute.

DOE d. OLDHAM v. ROE.

An affidavit of service of a declaration in ejectment upon the person in possession is insufficient.

ROWE moved for judgment against the casual ejector. The affidavit stated a personal service upon the *persons* in possession, instead of the *tenants* in possession.

The Court refused the rule.

Rule refused.

PHYTHIAN v. WHITE and Another.

To trespass in three closes, *A.*, *B.* and *C.*, the defendant pleaded—*first*, soil and freehold in *L.*; and, *secondly*, that the closes were parcel of a manor of which *L.* was lord, and that the closes had been wrongfully inclosed. The plaintiff replied to the first plea a seisin in fee in other persons, who let to the plaintiff, and traversed that the closes were part of the waste of the manor of which *L.* was lord, as alleged in the second plea. The defendant rejoined to the replication to the first plea by traversing the seisin in fee of the parties mentioned therein. At the trial no evidence was given as to close *A.*, and as to the other two, the jury found for the plaintiff:—*Held*, that the issues were divisible, and that the plaintiff was entitled to retain his verdict, and that the defendant was entitled to a verdict as to close *A.*

TRESPASS.—The declaration contained two counts. The *first* count alleged, that on divers days and times the defendants broke and entered three closes, (each being described by its abutments), and destroyed posts and rails of the plaintiff, being upon each of the closes respectively. The *second* count was for destroying posts and rails of the plaintiff, standing and being upon certain land.

Pleas.—*First*, as to breaking and entering the closes, &c., and cutting and breaking away the posts and rails, that the said closes were at the said times the closes, soil, and freehold of *Thomas Legh*, and that the defendants, as his servants, and by his command, committed the trespasses; and because the posts and rails were wrongfully erected, the defendants removed them, as encumbering the ground. The *second* plea alleged, that the closes had been respectively, from time immemorial, within and parcel of the manor of *Newton* and fee of *Macclesfield*, in the county of *Lancaster*, and were parcel of the waste within the manor; that *Legh* was lord of the manor and fee, and seised in his demesne as of fee of the closes; and that the closes, shortly before the times when &c., had been wrongfully inclosed by the plaintiff from the waste; and that the defendants, by command of *Legh*, broke and entered the closes, and removed the posts, &c. As to the trespasses not covered by the special pleas—not guilty.

The replication to the first plea alleged, that before the said times, and before *Legh* had anything in the closes in which &c., or any of them, and before the said *T. L.* had anything in the said closes, in which, &c., or any of them, one *R. T.* and *Mary* his wife, in right of his wife, one *E. L.* and one *E. K.*, were seised in their demesne as of fee of and in two undivided three parts, the whole into three equal third parts to be divided, of and in the said closes in which &c., by reason of the said *M. T.*, *A. L.*, and *E. K.*, then being the daughters and co-heiresses of the Rev. *T. K.* deceased; and one *A. R.* was also then seised in her demesne as of fee of and in the other undivided third part of and in the said closes in which &c. The replication then stated a fine levied by *R. T.* and *M.* his wife to the use of the said *M. C.* and his heirs during the natural life of the said *M. T.*; and that the said *M. C.*, *A. L.*, *E. K.*, and *A. R.*, being so seised, they afterwards, and before the said *T. L.* had anything in the said closes

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in which &c., or any of them respectively, demised his and her interest in the closes to the plaintiff, to hold from year to year. The replication to the second plea was, that *Legh* was not, in right of the said supposed manor, &c., seised in fee of the closes in which &c., as being part and parcel of any waste within and parcel of the said manor, &c. New assignment of other trespasses than those in the introductory part of the said first and last pleas mentioned.

The rejoinder to the replication to the first plea traversed that *R. T.* and *M.* his wife, in right of his said wife, and the said *A. L.* and *E. K.*, were not seised in fee, &c. Judgment by default was suffered to the new assignment.

At the trial before Lord *Abinger*, C. B., at the last assizes, no evidence having been given with respect to the first of the three closes, it was objected, on behalf of the defendant, that the issue, in the way it was framed, being entire with respect to the three closes, the verdict ought to be for the defendant, or that at least the verdict ought to be for him so far as the first close was concerned. The learned Judge left it to the jury to find a verdict for the plaintiff as to those closes to which the evidence applied; and they found for the plaintiff as to the last two closes, and found nothing as to the other. Leave was given to move to enter a verdict for the defendant. A rule *nisi* was accordingly obtained to enter one generally for the defendants, or with respect to the first close, which was described as abutting on *Clapgate Lane*; against which—

Wightman, *Cowling*, and *Ramshay* shewed cause.—They relied on *Tapley v. Wainwright* (a), and *Cousins v. Paddon* (b).

(a) 2 Nev. & M. 697; 5 B. & Adol. 395.

(b) Ante, p. 488.

Cresswell, Crompton, and W. H. Watson, contra, cited *Bassett v. Mitchell* (a), and *Cobb v. Bryan* (b); and they endeavoured to distinguish *Tapley v. Wainwright* from the present case; but—

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The Court (c) were of opinion that the issue was distributable, and that the plaintiff was entitled to retain his verdict; but that the defendant was entitled to have his rule absolute for entering a verdict as to the *Clapgate Lane* close, with the costs of the application so far as regarded that part of the rule.

Rule absolute.

(a) 2 B. & Ad. 99.
(b) 3 B. & P. 348.

(c) Lord Abinger, C. B., Parke,
Bolland, and Gurney, Barons.

WARD v. GRAYSTOCK.

JOHN BAYLEY moved to strike out one of two counts in a declaration, as being in violation of the late rules of pleading. The particulars shewed that the action was brought by an out-going against an in-coming tenant, for out-going rights quitted by him, and taken by the defendant. The first count was special, that in consideration that the plaintiff, whilst he was tenant, had expended money in erecting buildings, and cropping the land, &c., and that the defendant had since entered on the land as tenant, and enjoyed a great part of the benefit of the said buildings, &c., so left and relinquished by the plaintiff, the defendant promised to pay what the plaintiff reasonably deserved to have. The other count was *indebitatus assumpsit*, for giving up the farm, and for work and labour, seeds, &c.

Applications to strike out counts ought to be made to a Judge at chambers, in the first instance.

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PARKE, B.—The counts certainly appear to me to be founded on the same cause of action, but varied in the mode of stating it. Such applications as these ought to be made to a Judge at chambers in the first instance, and if a doubt arises the parties may come to the Court.

Rule refused.

WORRALL v. GRAYSON.

A plea to a declaration in *assumpsit* for money paid, and on an amount stated, that the plaintiff and defendant were partners, and that the cause of action arose out of unadjusted partnership transactions, is bad on special demurrer.

ASSUMPSIT.—The declaration alleged that the defendant was indebted to the plaintiff in 100*l.*, for money paid by the plaintiff for the use of the defendant, and in 100*l.* for interest, and in 100*l.* for money found to be due on an account stated.

Pleas.—That before and at the time of the commencement of this suit, and at the time of the accruing of the causes of action in the declaration mentioned, to wit, on &c., the plaintiff and defendant used, exercised, and carried on the trades and businesses of millers, farmers, and smiths, in copartnership. And the defendant says, that the causes of action in the declaration mentioned arose out of and from transactions between the plaintiff and defendant as such copartners; and that, at the time of the commencement of this suit, the accounts of the said partnership were not settled, adjusted, or any balance struck by or between the plaintiff and defendant, and the same are still open and unadjusted; and this the defendant is ready to verify, &c.

Demurrer—alleging for causes, that the plea is an argumentative denial of the promises alleged in the declaration, and amounts to the general issue of *non assumpsit*, and does not sufficiently confess and avoid the causes of action alleged in the declaration, &c., &c.

Addison appeared in support of the demurrer; but—

Petersdorff was called on by the Court to support the plea. He contended, that the plea was in confession and avoidance, it admitted the promise, but shewed that it could not be enforced at law, because the plaintiff and defendant were partners.

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PARKE, B.—The plea in effect denies that any such promise was made to the plaintiff to pay money to him, as is alleged in the declaration; it does not state distinctly that the cause of action was a partnership account, but only that it arose out of transactions between them as partners; it is possible that it may have been a separate transaction; the defence is not stated with sufficient certainty; the plea only denies that the defendant was indebted to the plaintiff, and amounts to *non assumpsit*.

LORD ABINGER, C. B.—The plea is bad on several grounds.

Judgment for the plaintiff.

BELLOTTI v. BARELLA and Another.

WIGHTMAN had obtained a rule *nisi* for setting aside a declaration for irregularity, with the costs occasioned by the declaration and this rule.

Upon an affidavit of debt against two, a declaration against one is irregular.

Humfrey shewed cause.—It appeared that the affidavit to hold to bail was against both the defendants, upon which a *capias* issued, and one was taken, against whom alone the plaintiff declared. A summons for setting aside the declaration had been before taken out, but the learned Judge had refused to interfere, and referred the parties to the Court. In consequence of a decision of one of the Courts in another case that such a declaration was irregular, the plaintiff gave notice to the other side that he

After a summons had been taken out for setting aside an irregular declaration, and both parties having attended before the Judge, who referred them to the Court:—*Held*, that the plaintiff could not withdraw the declaration without paying costs.

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withdrew the declaration; but the defendant claimed costs, and upon refusal this motion was made. It was now contended, that, as the summons did not pray for costs, the defendant was not entitled to claim them; and *Rex v. Sheriff of Middlesex* (a) was cited as in point. It was also contended, on the authority of *Hargrave v. Holden* (b), that, as the plaintiff had agreed to do all that the rule prayed for, it was unnecessary, and the costs ought not to be allowed.

PARKE, B.—The declaration was clearly irregular; that was decided in *Carson v. Dowding* (c). If, after the summons was served, the plaintiff had waived the declaration, the defendant could not have claimed costs; but after going before the Judge, I think the plaintiff ought to pay the costs.

The other Barons concurred.

Rule absolute.

(a) Ante, Vol. 2, p. 5.

(b) Ante, Vol. 3, p. 176.

(c) Ante, p. 297.

SHAW v. OATES.

A defendant, by consenting to a cause being tried before the sheriff, under the Writ of Trial Act,

knowing at the time that he was liable to be sued for the debt in a local Court only, does not thereby waive his right to claim costs from the plaintiff, upon his recovering less than 5*l*.

A local act gives treble costs to a defendant who is sued for less than 5*l*. in any other than the local Court, so as it shall appear to the Judge or Judges of the Court where the action is tried that the debt is under 5*l*., and the defendant shall give evidence, to be allowed of by the Judge of the Court where such action is brought, that the defendant is resident within the local jurisdiction. The cause is tried by the under-sheriff, under the Writ of Trial Act, and the defendant gives evidence of his residing in the local jurisdiction, and the plaintiff recovers less than 5*l*. *Quære*, whether the Court above can give costs to the defendant under the act?

BUTT applied on behalf of the defendant in this action for a new trial, or that a nonsuit might be entered and the defendant have treble costs. The action was tried

before the under-sheriff of *Derby*, a Judge's order for that purpose having been obtained under the Writ of Trial Act. The plaintiff recovered 4*l.* 17*s.*, and the defendant proved at the trial, that he resided within the jurisdiction of the Court Baron of the Hundred of *High Peak* and manor of *Castleton*, in the county of *Derby*; and a printed copy of the acts (a) establishing the court was produced and read, but the assessor refused to nonsuit the plaintiff.

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Alexander shewed cause upon two grounds:—*First*, that the defendant's consenting to have the cause tried before the sheriff, when he knew that the plaintiff's demand was under 5*l.* and that the defendant was entitled to be sued in the Hundred Court, was a waiver and abandonment of the right which the act gave him to have his

(a) 33 Geo. 2, c. 31, s. 55, which enacts, "That in case any personal action for the recovery of any debt or damages shall be commenced and prosecuted against any person or persons after the said 24th day of June, 1760, in any of His Majesty's Courts of record at Westminster, or elsewhere, out of the said courts baron respectively, and it shall appear to the Judge or Judges of the Court where such action shall be tried that the debt or damages to be recovered by the plaintiff or plaintiffs in such action doth not amount to the sum of 40*s.*, [increased to 5*l.* by 45 Geo. 3, c. 61], and the defendant or defendants in such action shall duly prove by sufficient testimony to be allowed by any Judge or Judges of the Court where such action shall be tried, that, at the time of com-

mencing such action, such defendant or defendants was or were resident within the jurisdiction of either of the said Courts Baron, and was or were liable to be summoned or warned in either of the said several Courts Baron for such debt or damages, then and in such case, *unless the Judge or Judges who shall try such cause* shall, in open Court, certify in writing under his or their hands respectively, that there was a probable or reasonable cause of action for 40*s.*, or more, or that the freehold or title to lands or tenements principally came in question at such trial, such plaintiff or plaintiffs shall not recover, but be nonsuited in such action, and the defendant or defendants shall be entitled to, and shall be allowed and recover, treble costs of suit."

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cause tried in the inferior Court; and, *secondly*, that the Court could not order a nonsuit to be entered, as the assessor who tried the cause was not a Judge of the Court in which the action was brought, so as to be capable of allowing the sufficiency of the evidence or giving a certificate according to the terms of the act; and, *thirdly*, that the facts ought to have been pleaded.

Butt was heard against these objections.

The Court (a) held, that the defendant, by consenting to try before the sheriff, had not waived his right to the benefit of the act. With respect to the claim for treble costs, they said that there was a difficulty in this Court giving treble costs, because the fact of the defendant residing within the jurisdiction did not appear on record, and a suggestion could not be entered, because there was no affidavit; that there was a doubt about the proper construction of the act, and, the Court not being agreed, they recommended a *stet processus*, on payment of the debt actually due, without any costs; which was agreed to.

(a) Lord Abinger, C. B., Parke, Alderson, and Gurney, Barons.

GUNTER v. M'KEAR and Others.

Upon an application for the issuing a commission to examine witnesses abroad, the names of the witnesses ought to be given in the affidavits, or at least some certain description of them.

BUTT shewed cause against a rule which had been obtained by *Cowling* for the issue of a special commission to examine witnesses in the island of *Jamaica*. It appeared that the action was on a special agreement, whereby the plaintiff agreed to become supercargo, and the defendants agreed to employ him in that capacity for a certain time; and the complaint was, that the plaintiff had been discharged by the defendants, contrary to the agreement.

The defendants had pleaded the general issue, and also that the plaintiff had been guilty of criminal conversation, of which they were ignorant at the time of the agreement. The affidavits in support of the rule alleged that the defendant had been guilty of criminal conversation some years since in *Wales* and *Jamaica*, and that the defendant was therefore unfit to be supercargo. It was also alleged that there were several persons in *Jamaica* who could prove the fact, and were material to the defence, who would come to *England*. It was objected, that this was too general; that the names of the witnesses ought to have been given.

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Cowling, in support of the rule, contended that it was not necessary, as it is alleged in the affidavit that the defendant is unable to state the names.

LORD ABINGER, C. B.—I think this rule must be discharged. The act authorizes us to issue a commission to examine witnesses, but not to find out witnesses. I am not aware of any instance of such an application without specifying the names, and I think the objection taken is a good one. Not only are the names omitted, but no address or any description is given. This has the appearance of being a speculative motion.

PARKE, BOLLAND, and GURNEY, Barons, concurred.

Rule discharged.

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JEE v. POTTER.

On a motion for judgment as in case of a nonsuit, the Court only takes notice of the last default.

MILLER shewed for cause against a rule for judgment as in case of a nonsuit, the absence of a material witness at the last Assizes. He offered to give a peremptory undertaking.

Hoggins, in support of the rule, objected that two defaults had been sworn to in the affidavit; one at the last *Summer* Assizes, and a former one at the *Spring* Assizes, and only the last default had been explained.

PARKE, B.—The Court only takes notice of the last default. The rule must be discharged on the usual terms.

Rule discharged on a peremptory undertaking.

WEAVER v. STOKES.

To entitle a defendant to relief from a judgment signed on a warrant of attorney, given by him for the price of goods supplied by the plaintiff, on the ground of infancy, the defendant at the time keeping a shop, and acting as if he were of age, he ought to make out a clear case: merely swearing that he is an infant of the age of twenty years, and giving an extract from a register of births, is not sufficient for the Court to act upon.

GODSON had obtained a rule *nisi* for setting aside a judgment and subsequent proceedings, and that the money levied might be retained, on affidavits which alleged that the defendant had, at the instance of the plaintiff, given a warrant of attorney as a security, and that the plaintiff had caused execution to be issued without notice, and had seized a great quantity of goods, which had been sold at much less than a fair price; and circumstances of misconduct on the part of the officers were also detailed. The defendant also swore that he was an infant of the age of twenty years; and an extract of the defendant's baptism was annexed, which was sworn to be a "true copy of an entry made in the book kept by the minister of *Neen Savage*, in the county of *Salop*, for

registering baptisms in the said parish;" the date of it was *September 3rd*, 1815.

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Erle shewed cause, upon an affidavit that the defendant kept a shop, and had been supplied with goods by the plaintiff upon the security of the warrant of attorney which the defendant had given; that the plaintiff did not know that the defendant was under age, and that, from his appearance, he considered that he was of full age. It was contended, that the plaintiff was not answerable for the misconduct of the sheriff or his officers, and that it did not clearly appear from the defendant's affidavits that he was under age, the affidavit not expressly negating that he was more than twenty years old; and that the register from which the extract was made did not appear to be a parish register, nor was it conclusive as to the age of the defendant, who had held himself out to the world as being of full age.

Godson was heard in support of the rule.

LORD ABINGER, C. B.—I think the rule should be discharged. The plaintiff has sworn that he believed the defendant to be of full age, which is all that the plaintiff could be expected to swear; and, in the absence of any affidavit from his father or mother, or any person acquainted with his age, it cannot be assumed on the defendant's affidavit that he is not more than twenty years old.

PARKE, B.—I am also of opinion that infancy is not made out with sufficient clearness to entitle the defendant to relief.

BOLLAND, B.—I am of the same opinion.

GURNEY, B.—The defendant, after holding himself out

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to the world as a person of full age, and giving a warrant of attorney, ought to make out a clear case for relief.

Rule discharged.

HERBERT v. DARLEY.

Though the service of process should be personal to entitle a plaintiff to enter a common appearance, the Court will not set aside proceedings on an affidavit of defendant, that he has not been personally served, accompanied by an affidavit of his daughter, that she received and opened the letter containing the copy of the writ.

Where there appears to have been a delay of more than eight days before moving to set aside proceedings for irregularity, the defendant must clearly explain the delay, otherwise the presumption will be against him.

ARCHBOLD moved to set aside a notice of a declaration being filed for irregularity. The notice of declaration was served on the 13th of *January*. The defendant swore that he had not been personally served with the writ. A daughter of the defendant swore that a letter came to the house, which she opened, and the copy of the writ against the defendant was inclosed in the letter. An affidavit of personal service had been made and an appearance entered before the declaration was filed, and an office copy was produced. It was contended, on the authority of *Thompson v. Phenev* (a), that the service was insufficient; and the judgment of *Patteson, B.*, was quoted, in which he rebukes the practice of swearing to a personal service under such circumstances; and it was urged, that if such a service were allowed, a writ would always be served in a letter.

LORD ABINGER, C. B.—I think sufficient is not shewn to warrant us in granting a rule. The defendant does not negative that the writ came to his hands. The defendant, after the process was left at the house, may have admitted having received it; that would be quite consistent with his affidavit.

PARKE, B.—The delay in making the application is of itself a sufficient answer (b). The rule is, you ought to come in eight days after notice. It is not shewn when the

(a) *Ante*, Vol. 1, p. 441.

(b) The motion was made on the 18th.

defendant knew of the appearance, or of the writ; and, in the absence of any such statement, it must be assumed that the writ came to the defendant's hands shortly after it was left at the house.

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GURNEY, B.—I am also of opinion that there should be no rule.

Rule refused.

WRIGHT v. SKINNER.

HUMFREY shewed cause against a rule for judgment as in case of a nonsuit.—From the affidavits it appeared that it was a town cause, and that issue was joined on the 22nd of July, and on the 27th the defendant applied to a Judge at chambers for an order to try before the sheriff. *Alderson, B.*, made an order that the plaintiff should try in a fortnight, unless a *stet processus* was agreed to; the plaintiff then protested against the order, and refused to draw up the rule, or to give notice of trial. The defendant, however, drew up the order, whereupon the plaintiff took out a summons for postponing the time for trial; and upon that summons a new order was made by the Judge at chambers, that the trial should take place on the *Thursday* following, the defendant undertaking to accept notice of trial for that day. No notice of trial, however, was given. It was now contended, that the learned Baron had no power to make the first order, and that this motion was made too early (a): and *Butterworth v. Crabtree* (b), and *Harle v. Wilson* (c), were relied on to shew that a motion for judgment as in case of a nonsuit cannot be made till the next term after that

Where a defendant obtains an order for trial before the sheriff, under the Writ of Trial Act, a Judge has no power to impose terms upon the plaintiff against his consent, as to the time of trial.

A party who applies to a Judge for indulgence, and obtains it on certain terms, may draw it up or not, as he thinks proper; and the opposite party, by drawing it up himself, without the consent of the party applying, does not thereby make it operative against him.

(a) The rule nisi was obtained in Michaelmas Term.

M. & R. 519, S. C.

(c) Ante, Vol. 3, p. 658.

(b) Ante, Vol. 3, p. 184; 1 C.

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in which issue is joined, where no notice of trial has been given.

Mansel, in support of the rule, contended, that the 3 & 4 *Will.* 4, c. 42, s. 17, authorized the learned Judge to make the order; and, *secondly*, that the plaintiff, by taking out a summons for further time, had so far acted upon the order as to waive his right to object to it. In the cases cited, the order to try before the sheriff had been obtained by the plaintiff; here, it was obtained and drawn up by the defendant, and the plaintiff ought to have complied with the terms of it by giving notice of trial.

PARKE, B.—I am of opinion, that a Judge at chambers has no power to impose terms upon a plaintiff, when the defendant applies for an order to try; but as no application was made by the plaintiff to set aside the first order, I think we cannot treat this motion as irregular. The rule must be discharged, but without costs.

ALDERSON, B.—I also think that I had no power to make the order; the plaintiff therefore applied unnecessarily for postponing the time for trial; and where a party applies for indulgence, and it is given on terms, he may act on it or not, as he thinks proper. The order for further time therefore goes for nothing, for the defendant had no right to draw it up, if the plaintiff declined to do so.

BOLLAND and GURNEY, Barons, concurred.

Rule discharged, without costs.

NUNN v. CURTIS.

CAREY obtained a rule *nisi* for setting aside the appearance and subsequent proceedings for irregularity, or why the judgment should not be set aside on payment of costs, the defendant being a minor, and an appearance having been entered by the plaintiff for the defendant by attorney; judgment was signed by default, and the defendant was served at college. *Roberts v. Spurr* (a) was cited, and *Bligh v. Minster* (b), to shew that common bail cannot be filed for an infant by attorney, though he is sued with others.

An appearance entered by a plaintiff for an infant defendant by an attorney, is irregular, and the subsequent proceedings may be set aside without costs, even after a writ of inquiry executed.

A motion on behalf of an infant defendant to set aside irregular proceedings, may be made by his father or an attorney, but it must appear to be made with the consent of the defendant.

Kelly shewed cause, and objected that the affidavit in support of the rule was made by the father of the infant, and the attorney for the defendant; he contended that the defendant could only appear by guardian or in person, and that the attorney's affidavit could not be received.

LORD ABINGER, C. B.—I think that objection ought not to prevail on a motion of this description.

Kelly then objected that it did not appear that the application was made on the defendant's behalf, or by his authority. The defendant himself made no affidavit.

The Court held this to be a good objection, but gave leave to amend.

A fresh affidavit was obtained that the motion was with the defendant's consent, and that he approved of it, but it did not appear that it was originally made with his knowledge; but it was held that this was sufficient. From the

(a) Ante, Vol. 3, p. 555. (b) Tidd's Practice, MS. p. 99 (9th ed.)

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affidavits in answer to the rule, it appeared that the action was brought for the price of a horse, and for horse hire, and was commenced on the 19th of *November*; and that interlocutory judgment was signed on the 9th of *December*, a writ of inquiry executed on the 15th, and final judgment signed early in *January*, and a forbearance to issue execution at the solicitation of the defendant; and the plaintiff denied all knowledge of the defendant's infancy. It was contended, therefore, that the proceedings could not be treated as irregular, especially after such a lapse of time and acquiescence, and that the judgment could only be set aside on payment of costs: but—

The Court (after hearing *Platt* and *Carey* in support of the rule) held, that the fact of the defendant living at college ought to have put the plaintiff upon inquiry; and that, as the proceedings might be set aside by writ of error, when the plaintiff would get no costs, it was for the benefit of both parties to interfere on motion, by setting aside all the proceedings subsequent to the appearance, without costs, and letting the defendant in to defend: but if the horse was delivered up in a fortnight, it was agreed that a *stet processus* should be entered, without costs.

Rule absolute.

WOODCOCK v. KILBY, Clerk.

Upon bailable process against two, a declaration against one is irregular.

After notice given of an irregularity in de-

claring, which was denied by the other side, a summons to set aside proceedings was taken out, but a Judge at chambers refused to make an order, or to allow time till the term to move; and the defendant's attorney, to prevent judgment, applied frequently for time to plead, which was consented to:—*Held*, that it was not too late in the next term to move to set aside the proceedings with costs, for the same irregularity for which the summons was taken out.

JOHN JERVIS obtained a rule *nisi* for setting aside a declaration with costs for irregularity, the affidavit of debt and *capias* being against two, and the declaration against one only. The declaration was delivered on the 14th of

December, when notice of the irregularity was given, but the plaintiff's attorney insisted that he was right. On the 19th a summons was taken out to set aside the declaration for irregularity with costs, which was heard before Mr. Baron *Gurney* on the 22nd, who refused to make an order, or to allow time to move the Court in the next term; but the plaintiff's attorney consented to allow a week's time to plead. On the 30th of *December* further time was applied for, and a week's time was offered, on the defendant's attorney agreeing not to move the Court; but this was objected to, and time was given unconditionally. Another order for further time was also made by *Gurney*, B., "without prejudice to the plaintiff's right to avail himself of the objection to the defendant's application on the ground of waiver, by taking time to plead." It was sworn that time was obtained merely to prevent judgment being signed.

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John Bayley shewed cause, and contended that the declaration was regular, and cited *Coldwell v. Blake* (a); and, *secondly*, that the application was too late, after such a lapse of time; and that the defendant, by accepting time to plead so frequently, must be considered as having waived his right to take advantage of a mere irregularity.

John Jervis, *contra*, cited *Carson v. Dowding* (b), where it was held by *Littledale, J.*, that, upon a *capias* against two, a declaration against one is irregular; and he distinguished *Coldwell v. Blake* as being a case of serviceable process, between which andailable process a different rule had always prevailed. He contended that, as the defendant had done all he could to reserve his right, and only took time to prevent judgment, there had been no waiver.

(a) 3 D. P. C. 656; 2 C. M. & R. 249.

(b) 4 D. P. C. 297.

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The Court (a) held, that the proceedings were clearly irregular; and that, as notice had been given of the irregularity, and all the time obtained was before term, which was the earliest opportunity the defendant had had of moving the Court, the defendant was not precluded from applying, either by the lapse of time or by waiver.

Rule absolute.

(a) Lord Abinger, C. B., Parke, Bolland, and Gurney, Barons.

EDWARDS v. CHAPMAN.

In *indebitatus assumpsit* for goods sold and delivered, it is no plea that the sale and delivery were in pursuance of a contract, which it was agreed should be wholly rescinded.

ASSUMPSIT for 200*l.* for goods sold and delivered, 200*l.* for money paid, &c.

Plea—As to the price and value of 850 pair of trimmings, parcel of the said goods in the said declaration mentioned, to wit, the sum of 180*l.* 12*s.*, parcel of the sum of 200*l.* in the said declaration first above mentioned, the defendant says that the plaintiff ought not to maintain his aforesaid action thereof against him, because he says that the said goods, parcel &c., were sold and delivered by the plaintiff to the defendant in pursuance of a certain contract before then made between the plaintiff and the defendant; and that afterwards and before the commencement of this suit, to wit, on the 1st day of *June*, A. D. 1835, it was agreed between the plaintiff and the defendant that the said contract should be wholly rescinded and annulled, and the same was then wholly rescinded and annulled accordingly; and this the defendant is ready to verify; wherefore he prays judgment if the plaintiff ought to maintain his aforesaid action thereof against him.

General demurrer and joinder.

The ground of demurrer stated in the margin was as follows: "The plaintiff contends, that, no written contract

being mentioned in the declaration, the rescinding of it is no defence."

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Cowling, for the demurrer.—The plea is no answer to the declaration. The declaration is for goods sold and delivered to the defendant, who does not deny that he has the goods, but says that the original contract is at an end. Even if the original contract were rescinded, the plaintiff would be entitled to recover on a *quantum meruit*. *Colburn v. Planchè* (a).

R. V. Richards, contra.—The plea alleges that the goods were sold under a contract, which the demurrer admits, and also that the contract was mutually put an end to.

PARKE, B.—The delivery of the goods raises a duty. It cannot be assumed that the contract was in respect of any other goods than those delivered. A contract, whilst it is existing, may be rescinded; but, after a part performance, it cannot be got rid of without accord and satisfaction.

LORD ABINGER, C. B., BOLLAND and GURNEY, Barons, concurred.

Judgment for the plaintiff.

(a) 1 Moore & Scott, 51.

HODGES v. GRAY.

COVENANT.—The declaration, after setting out a deed of partnership between the plaintiff and defendant, in a covenant to allow a business to be carried on in a certain shop, a breach that defendant *improperly* shut up the shop is sufficient, without alleging that the shop was shut up at unreasonable or improper times.

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as druggists, by which it was, amongst other things, mutually covenanted between them that the business should be carried on in certain (specified) premises, or in such other house as they should mutually decide on, and that the defendant should diligently employ himself in the business, and carry it on to the greatest benefit, alleged as a breach, that the defendant would not suffer or permit the business to be carried on at the premises agreed upon, and wrongfully and *improperly* closed and shut up the shop for three days, and hindered the plaintiff and customers from entering during that time, and thereby obstructed the trade, &c. The defendant demurred specially that it did not appear that the shop was closed at unreasonable or improper times; that it was not shewn how he hindered the plaintiff and customers from coming in and getting medicines; and that it did not appear from the deed that the plaintiff was not at liberty to shut up the shop at such time as he thought fit; and that the breach was too general, &c.

Humfrey supported the demurrer.

Per Curiam.—The breach is sufficiently certain.

Judgment for the plaintiff.

BULL v. TURNER.

Money deposited by a third person, in lieu of special bail, cannot be got back by application to the Court, on the defendant's rendering; it must remain in Court to abide the event.

THIS was a rule which had been obtained by *Mansel*, calling on the plaintiff to shew cause why money deposited in lieu of bail should not be paid out to *Ann Turner*, one of the bail, or the defendant. On cause being shewn, it appeared from the affidavits on both sides, that *Ann Turner* having been applied to by the defendant to become bail

above, she had agreed to deposit the amount of the debt claimed, with the usual sum for costs, in a banker's hands, which sum was accordingly paid in lieu of bail. In *January* the defendant rendered in discharge of his bail, but judgment had been previously obtained by the plaintiff, and the costs had been taxed before the motion was made. It was contended, in support of the rule, that, though the deposit was not made precisely according to the terms of the 7 & 8 *Geo. 4*, c. 71, s. 3, which applies to defendants, the words being, "that the *defendant* may make a deposit in lieu of special bail," and "that the money so deposited shall, by order of the Court, be repaid to the defendant," yet that this was a case within the equity of the statute; that where bail are put in, they may, at any time before the defendant is charged in execution, render him in their discharge, so as wholly to exonerate themselves; and that here the defendant had been duly rendered, and notice given before the defendant was charged in execution; and that the reason which induced the Courts to allow bail to render a defendant in their own discharge, where they had entered into the usual recognizance, applied equally to the case of bail who had deposited money in her own name as bail (for the defendant).

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PARKE, B.—How can it be done except under the statute?

Mansel referred to *Nunn v. Powell* (a), and cited *Tidd's Practice* (b), where the Court of *Common Pleas* allowed money paid into Court by a third person in lieu of bail to the sheriff, to be repaid to that person on the defendant rendering. The words of the 43 *Geo. 3* are very similar to those of the 7 & 8 *Geo. 4*, "that the money so deposited

(a) 1 Smith's Reports, p. 13.

(b) Page 228, 9th edit.

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shall, upon bail being duly put in, be ordered to be repaid to the *defendant*, on motion for that purpose."

PARKE, B.—In that case the money was paid to the sheriff; here it was paid in in lieu of special bail, to abide the event of the suit. When the money is once in Court, I think it must stay there till judgment is satisfied. If bail pay in money in lieu of the defendant, they can only get it back in case the defendant succeeds.

LORD ABINGER, C. B., ALDERSON and GURNEY, Barons, concurred.

Rule discharged, with costs.

The Honourable R. G. QUIN and AMELIA his Wife
v. WILLIAM KING.

In debt on a bond, conditioned for paying money, and also for performing covenants in an indenture, the declaration, after setting out the condition, alleged a breach in the non-payment of the money. The defendant pleaded *non est factum*:—*Held*, that upon this issue a *venire ad triandum* was sufficient to warrant the jury in assessing the damages.

Cause may be shewn in the first instance in the *Exchequer*.

THIS was an action of debt on bond given by the defendant to the plaintiff *Amelia* before her marriage with the other plaintiff, in the penal sum of 5600*l.*, conditioned to pay to *Amelia* 2800*l.*, with interest at 5 *per cent.*, on or before the 14th of *February*, 1814, according to and in the full performance and discharge of the proviso or condition mentioned in a certain conditional surrender, bearing even date with the said writing obligatory, (whereby one *Thomas King* did duly before the said intermarriage surrender to the use of the said *Amelia* certain lands and premises, for better securing payment to her the said *Amelia* of the said sum of 2800*l.* and interest as aforesaid), and also well and truly to observe, perform, fulfil, and keep all and singular the covenants, grants, articles, and conditions and agreements whatsoever which on his and their parts and behalfs were or ought to be observed, performed, fulfilled and kept, comprised and mentioned in the said recited indenture, and that in all things according

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to the true intent and meaning thereof, &c. The declaration then averred, that the said proviso or condition so referred to as aforesaid, in the said condition to the said writing obligatory, as being mentioned in the said conditional surrender, was and is a certain proviso or condition whereby it was provided that if the said *Thomas King*, his heirs, executors, and administrators, did and should well and truly pay, or cause to be paid to the said *Amelia*, her executors, administrators, and assigns, the full and just sum of 2800*l.* of lawful money of *Great Britain*, with interest for the same after the rate of 5 *per cent. per annum*, on the said 14th of *February*, and that without making any deduction or abatement thereout whatsoever, then that the said conditional surrender, and every estate, matter, and thing in the said conditional surrender before contained, should cease, determine, and be utterly void, any thing thereinbefore contained to the contrary thereof in anywise notwithstanding, otherwise to be and remain in full force and effect, &c. Averment, that the said *Thomas King*, his heirs, executors, administrators, or assigns, did not pay the said sum of 2800*l.* to the said *Amelia* before the said marriage, or to the said plaintiffs after the said marriage, on or before the said 14th of *February*, which day elapsed before the commencement of this suit, but therein failed and made default, whereby the said writing obligatory became and was forfeited; and that the *sum of 2800*l.* is still wholly due and unpaid to the plaintiffs*, whereby &c., to the plaintiffs' damage of 10*l.*

Plea—*non est factum*.

At the trial before *Alderson, B.*, the jury assessed the damages at 2370*l.*

Bayley now moved to set aside the assessment of damages, upon an objection taken at the trial, that the award of the *venire* upon the record was merely to try the issue,

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and not to assess the damages. An amendment had been applied for at *Nisi Prius*, but the learned Judge declined to amend, as the jury had already given their verdict before the mistake was discovered.

Addison proposed to shew cause in the first instance, which *Bayley* objected to, as being contrary to the practice of this Court; but the Court (after referring to the officers) held that it might be done. The discussion turned upon the form of the declaration and the effect of the plea, *Addison* contending that the fact of the money being due was admitted by the plea; and that, as the statute of 8 & 9 *Will. 3*, c. 11, s. 8, makes it obligatory upon the jury to assess the damages where the breach is assigned in the declaration, the jury had only done what they were required, and a particular form of *venire* was unnecessary. It was also contended, that, though the condition was for the performance of covenants as well as the payment of money, yet, as a breach was only assigned for the non-payment of the money, no assessment of damages was necessary, as it was merely matter of calculation; and *Murray v. Lord How(a)* was referred to, where it was held, that a *post-obit* bond was not within the act. Lastly, it was said, that, the objection being on record, the defendant might bring a writ of error. *Gainsford v. Griffith(b)*, and *Roberts v. Marriett(c)*, were also referred to.

Bayley, in support of the rule, contended that it was necessary to assign a breach, and that the proper way would have been by suggestion, as was done in *Ethersey v. Jackson(d)*; and it was there considered to be necessary to do so, after a plea of *non est factum*; that here there was no issue on the breach, and that the constant

(a) 2 B. & C. 82; 3 D. & R.
278, S. C.

(b) 1 Saund. 58, note (1).

(c) 2 Saund. 187 a, note (2).

(d) 8 T. R. 255.

practice was to have a *venire tam ad triandum quam ad inquirendum*.

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The Court said that they wished a search should be made for authorities.

Addison afterwards referred the Court to *Parkins v. Hawkshaw*(a); and on a subsequent day judgment was given by

PARKE, B.—After stating the pleadings, his Lordship proceeded thus:—It was objected that the plaintiff could not proceed to recover damages without a *special award of venire to assess the damages*, as well as *to try the issue*. The question turns upon the construction of the statute of 8 & 9 Will. 3, c. 11, s. 8, which provides that in actions on bonds, or on any penal sum for non-performance of covenants in an indenture, &c., the plaintiff may assign as many breaches as he shall think fit; and the jury, upon the trial of such action, shall and may assess not only such damages and costs of suit as have heretofore been usually done in such cases, but also damages for such of the said breaches so to be assigned as the plaintiff, upon the trial of the issues, shall prove to have been broken; and that, if judgment be given for the plaintiff on demurrer, or by confession or *nihil dicit*, the plaintiff upon the roll may suggest as many breaches of the covenants as he shall think fit; upon which shall issue a writ to the sheriff to summon a jury &c., to inquire into the truth of every one of those breaches, and to assess the damages which the plaintiff shall have sustained thereby. So that there are two classes of cases contemplated by the statute—one in which breaches may be assigned in the declaration, the other in which they may be suggested on the roll: if they are assigned, the jury may assess the damages without a

(a) 2 Stark. N. P. C. 38

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special *venire*; but where they are suggested (as on demurrer) there ought to be a special *venire* to enable them to do so. There appears to be no authority but the one which has been referred to, of *Parkins v. Hawkshaw* (a), where the very point was in question, and Lord *Tenterden* held that the jury might assess the damages without a special *venire* where a breach was assigned in the declaration; and his Lordship said, that he recollected a case on the Western Circuit, where it was so held, and that he also thought that that form of the record was correct. Upon that authority this rule must be discharged.

Rule discharged.

(a) 2 Stark. Rep. 381.

DAY v. DAY.

Semble, that judgment as in case of a nonsuit cannot be moved against a plaintiff who has once taken his cause to trial, though it took place before the sheriff, under the Writ of Trial Act, and that the proper course is to get a Judge's order for trying the cause by proviso.

E. V. WILLIAMS moved for judgment as in case of a nonsuit.—Issue was joined on the 14th of *January*, 1835, notice given of trial before the sheriff of *Worcestershire* for the 12th of *February*, on which day the trial took place, and afterwards a motion for a new trial, which was made absolute on the 9th of *May* following; and no notice of trial had been since given.

PARKE, B.—If the cause had been tried at the assizes, you could not have moved.

ALDERSON, B.—Why cannot you take the cause down by proviso? If there is any doubt about that, you can move to discharge the order for a trial before the sheriff.

Rule refused.

Williams (on a subsequent day) renewed the application, and admitted that in a common case he must have taken down the cause by proviso, but contended that the rule which was adopted in construing the 14 *Geo. 2*, c. 17, that a plaintiff, after having once tried his cause, cannot afterwards be compelled to go on, was a very inconvenient practice, and did not necessarily apply to actions tried before the sheriff under the Writ of Trial Act; that the act of 14 *Geo. 2* was so construed with reference to the then practice; but upon writs of trial the practice was now altered, and it had not yet been determined that the defendant can in such case try by proviso.

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LORD ABINGER, C. B.—I see no reason for laying down a different rule. It may be a question whether the act applies at all; if it does, is it the practice that the plaintiff must take his cause down to trial a second time?

PARKE, B.—If the act applies, the question is, whether, by analogy, you cannot take the cause down by proviso.

The Court granted a rule *nisi*, but recommended that an application should be made to a Judge at chambers.

The rule was not afterwards mentioned.

WRIGHT v. SKINNER.

GALE moved for a new trial in this action, which was brought in debt to recover the amount of a bill of costs of the plaintiff as attorney for the defendant. The defendant pleaded that he was never indebted. At the trial before the under-sheriff of *Middlesex*, the defence

Where, in an action of debt, an agreement to accept 5*l.* in full discharge of the debt was given in evidence upon the plea of never indebted, the

plaintiff being allowed to take a verdict for nominal damages, a new trial was refused.

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was, that a sum of 5*l.* had been paid to the plaintiff in full discharge ; the under-sheriff told the jury, that, as there was no plea of payment, the verdict must be for the plaintiff, either for the full amount, or for nominal damages. The jury found for the plaintiff—damages one farthing. It was now contended that the evidence was improperly received.

PARKE, B.—*Cousins v. Paddon* (a) is an authority that in an action for goods sold evidence in reduction of damages may be received under a plea of the general issue.

Gale.—No case has decided that payment may be given in evidence in reduction of damages, except *Shirley v. Jacobs* (b), which was not correctly decided; but this case goes further, because an agreement was allowed to be given in evidence.

PARKE, B.—It does not appear by the under-sheriff's notes that any objection was made to the receipt of this evidence; on the contrary it appears to have been admitted that 5*l.* had been paid, but that the plaintiff ascribed it to another account. As the under-sheriff has ruled according to the decision of the Court of *Common Pleas*, and Lord *Denman* in the *King's Bench* has also ruled the same at *Nisi Prius*, I think this rule must be refused.

ALDERSON, B.—I am of the same opinion. It is not alleged that the plaintiff was taken by surprise.

GURNEY, B., concurred.

Rule refused (c).

(a) Ante, p. 488.

(b) Ante, p. 136.

(c) A similar question arose in

a recent case of *Richardson v. Roberts*, before Lord Abinger, at *Nisi Prius*, where, in order to re-

duce the damages, evidence was tendered of the payment of 50*l.* since the action was commenced, by producing a receipt signed by the plaintiff and his wife for that sum; but his lordship refused to receive it. *Steer*, in this term, obtained a rule for reducing

the damages by the sum of 50*l.*, and relied upon *Shirley v. Jacobs*. After cause shewn in Easter Term, the rule was made absolute; but there were special circumstances in the case. See, also, *Lediard v. Boucher*, 7 Car. & P. 1.

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SARD v. RHODES.

ASSUMPSIT against the defendant as acceptor of a bill of exchange for 43*l.* drawn by *G. Parish*, and by him indorsed to the plaintiff.

Plea—That the defendant accepted the said bill for the accommodation of *Parish*, and that there never was any consideration or value for such acceptance, or for the defendant's payment of the bill, or any part of the amount thereof, whereof the plaintiff had notice; and that, after the bill became due, and before the commencement of this suit, to wit, on &c., *Parish* made his promissory note in writing, and thereby promised to pay to the plaintiff or order, 44*l.*, divers, to wit, six weeks after date, and then delivered the said note to the plaintiff, in full satisfaction and discharge of the said bill and the said cause of action in the said first count mentioned, and the plaintiff then accepted and received the said note in full satisfaction and discharge of the said bill.

Replication—That although true it is that the said *Parish* did make and deliver to the plaintiff the said promissory note in that plea mentioned, in full satisfaction and discharge of the said bill and the said cause of action in the said first count mentioned, yet the plaintiff avers that the said promissory note became due and payable, according to the tenor and effect thereof, at a day long since elapsed, to wit, &c.; and that the said promissory note still remains

A plea to an action on a bill of exchange for 43*l.* by an indorsee against the acceptor, that, after the bill became due, the drawer gave the plaintiff his promissory note for 44*l.*, in full satisfaction, and that the plaintiff accepted it in satisfaction, is a good answer to the action; and a replication that the note was not paid when due, is bad on demurrer.

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in the hands of the plaintiff wholly unpaid and unsatisfied.

Demurrer, assigning for causes, that the replication attempts to put in issue an immaterial matter; that, as it is admitted that the note was taken absolutely in satisfaction and in discharge of the said cause of action in the first count mentioned, the defendant's liability on the bill could not revive upon the dishonour of the note; and also that it is not alleged in the replication that the note became due or was dishonoured before the commencement of this suit, or was then in the plaintiff's hands, or that *Parish* was ever requested to pay the same, or that the same was presented for payment, or that the defendant had any notice of its non-payment, or was, after the dishonour of said note, requested to pay the amount of the said bill.

Joinder in demurrer.

Thesiger (with whom was *Shaw*) was stopped by the Court.

Tyndale objected to the plea.—The note is given by a third person, and not by the defendant. The agreement was only executory, and, though the plaintiff's remedy was suspended, it was liable to be revived upon the note being dishonoured.

LORD ABINGER, C. B.—The plea is a good plea in accord and satisfaction, founded upon a sufficient consideration. The replication admits that the note was accepted in satisfaction. Satisfaction given by any party is sufficient. The note appears to have been treated as a collateral security, when it was not; but the plaintiff may have leave to amend, on payment of costs.

PARKE, B.—The note is given for more money than the original bill, and the plaintiff has his remedy upon it.

The plaintiff may amend and take issue on the note being accepted in accord and satisfaction.

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Leave to amend.

WRIGHT v. SKINNER.

THIS was an action of debt by an attorney for a bill of fees, but the plaintiff did not describe himself as an attorney. *Non assumpsit* was pleaded, and the plaintiff obtained a verdict for a farthing damages.

An attorney plaintiff, though he does not describe himself as attorney on the record, does not, since the Uniformity of Process Act, lose his privilege of suing in the superior Courts, or subject himself to the operation of Court of Requests Acts.

C. C. Jones thereupon moved for a rule *nisi* to enter a suggestion on the roll to entitle the defendant to costs, under the *Middlesex* Court of Requests Act, 23 Geo. 2, c. 33, the defendant being resident within the jurisdiction of that Court. He relied upon *Parker v. Vaughan* (a), *Tagg v. Madan* (b), and *Burn v. Pasmore* (c), where it was held, that an attorney suing as a common person loses his privilege, and is liable to costs as other persons. In a late case, in the *King's Bench* Bail Court, of *Dyer v. Levi* (d), *Littledale, J.*, expressed an opinion that an attorney who sues as an ordinary person loses his privilege. He contended, that it ought to appear on the record that the plaintiff is an attorney, otherwise the Court will not recognise him.

Lord ABINGER said that the Court would inquire of Mr. Justice *Littledale* respecting the last case cited, as the Uniformity of Process Act was not intended to abolish the privileges of attorneys.

PARKE, B., (on a subsequent day), delivered the opinion

(a) 2 Bos. & P. 29.

(c) Ante, Vol. 1. p. 17.

(b) 1 Bos. & P. 629.

(d) Since reported, ante, p. 630.

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of the Court, that the plaintiff had not lost his privilege by suing as a common person. Before the Uniformity of Process Act, an attorney having the privilege of suing by attachment of privilege, was considered to have abandoned his right by suing as a common person, and that he put himself in the situation of an ordinary plaintiff; but, as he is obliged by that act to sue in the same way as other persons, he does not thereby waive his privilege, except where the defendant is an attorney. In the case cited, of *Dyer v. Levi, Littledale, J.*, has not yet delivered judgment, and intends to give the same opinion as this Court has come to (a). This rule must therefore be refused.

Rule refused (b).

(a) Ante, p. 630.

(b) This decision appears to overrule the case of *Lawless v. Timms*, ante, Vol. 3, p. 707, which

seems also at variance with *Parkinson v. Woodcock*, ante, Vol. 2, p. 550.

Duke of NORFOLK v. SPENCER.

An application for a *scire facias*, upon a judgment ten years old, will not be granted upon an affidavit of the plaintiff's present attorney, which merely states that the debt and costs are still unpaid: it must also be shewn that he was the attorney when the judgment was obtained, or there must be an additional affidavit of the attorney then employed.

HOGGINS moved for a *scire facias* to revive a judgment which was ten years old. The affidavit of the attorney stated that the debt and costs were still unpaid.

PARKE, B.—The affidavit of the attorney does not go far enough. It should either state that he was the attorney when the judgment was obtained, or there must be an affidavit of the attorney before employed. The affidavit must be amended.

Rule refused.

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THORNTON v. WHITEHEAD.

THIS was an application to strike out one of two counts in a declaration, as being in violation of the late rules of pleading. The particulars claimed 70*l.* 8*s.* for rent of certain premises. There were two counts in the declaration; one for double rent under the statute (a), and another for use and occupation. A similar application had been made to a Judge at chambers, who had declined to make an order.

A count for double rent, and also for the single value of the same premises, may be joined in the same declaration.

John Bayley now renewed the application, and relied upon *Lawrence v. Stephens* (b), as applying in principle to the present case. The two counts are founded on the same subject-matter, which is the occupation of the premises, but they are varied in the mode of stating it.

PARKE, B.—It appears to me that these counts shew distinct subject-matters of complaint; one is for the value of the occupation, the other is for a penalty under a statute. The Court have since doubted the propriety of the rule granted in *Lawrence v. Stephens*.

The Court (consisting of Lord ABINGER, C. B., PARKE, ALDERSON and GURNEY, Barons) expressed a decided opinion that these were two distinct demands, and that the new rules did not prohibit the introduction of two counts like the present, and that neither count could be struck out; and they therefore refused the rule.

Rule refused.

(a) 11 Geo. 2, c. 19, s. 18.

(b) Ante, Vol. 3, p. 777.

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HARTLEY v. RODENHURST.

A writ indorsed with the name of the firm of the attorney used in carrying on the business, satisfies the 12th section of the 2 Will. 4, c. 39, though only one of them is alive and an attorney.

W. H. WATSON moved to set aside a writ for want of a proper indorsement of the name of the plaintiff's attorney. The writ was indorsed "*Blackstock, Bunce and Vincent, Temple*, attorneys for the above-named plaintiff." There was an affidavit that *Blackstock* was dead; that *Bunce* was not an attorney, but one of the Masters of the *King's Bench*; and that *Vincent* alone was carrying on the business.

PARKE, B.—It is the name of the trading firm. I think that is sufficient to satisfy the statute.

Rule refused (a).

(a) See *Pickman v. Collis*, ante, Vol. 3, p. 429.

PERCIVAL v. BIRD.

The costs of enlarging a peremptory undertaking, on account of the absence of a material witness, must be paid by the defendant, and are not costs in the cause.

BUTT shewed cause against a rule which had been obtained by *Busby* for enlarging a peremptory undertaking, on account of the absence of a material witness, on which account the record had been withdrawn. He objected to it because of the lapse of time, the action having been commenced in 1833, and the issue having been joined early in 1835. He contended that it could only be on payment of costs.

Busby, contra, urged that, under the circumstances, the costs ought to be costs in the cause.

PARKE, B.—Applications to the favour of the Court can only be on payment of costs. These are not costs in the cause.

Rule absolute, on payment of costs.

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HOUGHTON v. HOWARTH.

S. HUGHES moved for a *distringas*, on an affidavit that three attempts had been made to serve the defendant at his residence in *Cardigan Street, Liverpool*. The applicant, on the second occasion, saw the wife, and made an appointment for the next morning, but the answer on each occasion was, "Not at home;" on the last occasion a copy was left. The affidavit further stated, that several other attempts had been made to find the defendant at home, without success, and that it was believed he kept out of the way to avoid being served.

In order to obtain a *distringas* for non-appearance, it must be shewn that the defendant is absent, or circumstances must be stated from which it can be inferred by the Court that the defendant is avoiding the process of the Court.

LORD ABINGER, C. B.—The defendant might have been absent on business for a short period.

PARKE, B.—There is not sufficient to shew that the defendant was absent at the time.

Rule refused.

RICHMOND v. BOWDIDGE.

CRIPPS moved for a rule for an attachment, absolute in the first instance, against an attorney, for not paying money pursuant to a rule of Court, which had been obtained against him by his client for the purpose of compelling him to pay over a certain debt and costs which he had received for his client, and which rule was drawn up in the last term, to be absolute *unless* cause was shewn against it by the attorney at chambers within a week, there not being at the time sufficient left of the term to have the rule disposed of in Court.

A rule for an attachment, for any other cause than the non-payment of money pursuant to the Master's allocatur, is only *nisi* in the first instance.

PARKE, B.—The practice is, not to grant a rule absolute, except for non-payment of money pursuant to the Master's allocatur.

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Cripps relied on *King v. Price* (a), where, a rule *nisi* obtained against an attorney for not paying over money having been made absolute by the Court, without opposition, the Court afterwards granted a rule for an attachment absolute in the first instance. It also appeared, he said, that the client had been kept without his money for twelve months, and the attorney had broken four appointments which he had made for the purpose of paying it.

PARKE, B.—The present case differs from the one cited; there, the rule for payment of the money was made absolute by the whole Court; here, it was made absolute by the authority of a single Judge. That case is a solitary instance of a departure from the general rule; and the Court are of opinion that it ought not to be extended. The rule will be only to shew cause.

Rule to shew cause.

(a) 1 Price, 341.

ISAAC v. FARRAR.

Where, in *assumpsit*, the plea admits the breach, and only alleges a number of facts, as matter of excuse, the replication of *de injuria* is proper.

To a declaration on a promissory note, by an indorsee against the maker, the

defendant pleaded, that an advertisement appeared in a newspaper, offering loans of money at low interest, and that the defendant, being in want of a loan, was induced, by the false representations of the individuals to whom he applied, to draw that and other promissory notes, for which he never had any consideration; and that all the parties to the bill were acquainted with these circumstances:—*Held*, upon special demurrer, that *de injuria* was a proper replication to this plea.

ASSUMPSIT on a promissory note dated April 29, 1835, whereby the defendant promised to pay to his own order 250*l.*, for value received, three months after date; and by the defendant indorsed to one *H. R.*, who indorsed it to the plaintiff.

Plea—That before the making by him of the said promissory note, to wit, on the 15th day of April, 1835, a certain advertisement had been and was inserted in a certain

newspaper, to wit, the *Morning Herald*, to the tenor and effect following, (that is to say): " Money to lend, upon personal security—Noblemen, clergymen, and persons of responsibility requiring the temporary advance of money, can be immediately accommodated with loans to any amount, at a very low rate of interest. Application to be made in the first instance in writing, addressed to Mr. *Anderdon*, 12, *Fludyer Street*, *Westminster* ;" that, in consequence of the said advertisement, he did, to wit, on the 18th of *April*, 1835, call at the said place, to wit, 12, *Fludyer Street*, and there saw one *Charles Anderdon* ; and that, in consequence of the representations made to him by the said *Charles Anderdon*, he the defendant was induced to draw and deliver, and he did then draw and deliver to the said *Charles Anderdon*, two promissory notes, whereby and by each of which the defendant promised to pay to his own order the sum of 250*l.* three months after the date thereof, one of them then being the said note in the said first count mentioned, upon the faith of and promise from the said *Charles Anderdon* that the said notes should be renewed when due for the space of two years, and that he should receive from the said *Charles Anderdon* on a certain day, to wit, the *Friday* then next following, being, to wit, the 1st day of *May*, 1835, the amount of the said notes, deducting discount and stamp ; that the said *Charles Anderdon* did not nor would, either on the said *Friday*, the said 1st day of *May*, 1835, or at any other time, although often requested so to do, pay to the said defendant the amount of the said notes, deducting as aforesaid, or any sum of money whatever, but on the contrary thereof the defendant saith, that he the said defendant, to wit, on the said 1st day of *May*, by appointment of the said *Charles Anderdon*, went to the said place, to wit, 12, *Fludyer Street*, but the said *Charles Anderdon* was not nor was any such person either then or at any time afterwards there to be found ; and that the said transaction was

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a gross fraud and imposition upon him the defendant; and that the note was indorsed to the plaintiff without consideration, and that he holds the same without value or consideration, and that there never was and is not any consideration or value on the said note between any parties thereto; that the said *Henry Richardson* and the said plaintiff, and each of them, at the several and respective times when the said note in the said first count mentioned was so indorsed and delivered to them respectively, as in the said first count mentioned, was privy to and had full knowledge and notice of the said transaction in this plea detailed, and of the said fraud and imposition.—Verification.

Replication—That the defendant of his own wrong, and without the cause by him in that plea alleged, broke his said promise in the said first count mentioned, in manner and form as the plaintiff hath in the said first count of the said declaration in that behalf complained against him.

Special demurrer—That the replication is bad for duplicity, because it is too large, and puts in issue all the several facts alleged by the plea, instead of putting in issue the point to be tried between the parties; that the facts of fraud and notice to the plaintiff, and the want of consideration for the note in the plaintiff's hands, alleged by the plea, are distinct and separable facts, on either of which the plaintiff might and ought to have tendered an issue, &c.

Joinder in demurrer.

This demurrer was argued by *Hoggins*, in support of it, and by *Humfrey* against it. The arguments of counsel are omitted, as the points made by them sufficiently appear from the judgment, which was delivered some days afterwards, by

Lord ABINGER, C. B.—On this demurrer to the replica-

tion two objections were made—*First*, that its form was improper, as the inducement of *de injurid*, &c., was inapplicable to an action of *assumpsit*; and, *secondly*, that it was bad because it was multifarious, and put in issue several distinct facts, each of which would, if disproved, be decisive of the action.

We think the replication is good, notwithstanding these objections.

This form, though most commonly used in actions of trespass, or trespass on the case for an injury, is not inappropriate to an action of trespass on the case for a breach of promise, where the plea admits a breach, and contains only matter of excuse for having committed that breach. The defendant's breach of promise may be considered as a wrong done, and the matter included under the general traverse, *absque tali causa*, and thereby denied as matter of excuse alleged for the breach. *Per Lord Ellenborough*, in *Barnes v. Hunt* (a).

No case in which this form of replication has been held to be improper resembles the present. In *Crisp v. Griffiths* (b), the plea was not matter of excuse for the breach of contract, but of subsequent satisfaction for that breach. In *Solly v. Neish* (c), the plea was a denial of the promise. So, in *Whittaker v. Mason* (d), the plea denied the contract as alleged; and although the Court intimated that it might be doubtful whether a traverse in this form was applicable to any action on promises, they abstained from deciding that question. On the other hand, in the case of *Noel v. Rich* (e), this Court expressed a strong opinion that this general form of traverse, in a case similar to the present, was proper; and we think that it is: for the plea confesses that the defendant made the note in question, and indorsed it to *Richardson*, who indorsed it to the plaintiff;

(a) 11 East, 455.

(b) Ante, Vol. 3, p. 753.

(c) Ante, p. 248.

(d) 2 Bing. N. S. 359; S. C. 2

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(e) Ante, p. 228.

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which constitutes a *prima facie* case of liability, and an implied promise to pay the amount to the plaintiff; and it avoids the effect of that admission, by shewing that the note was made and indorsed without value *bond fide* paid, whereby the defendant was excused from performing that promise.

As to the objection that the replication is multifarious, the facts contained in the plea, though they are several, constitute one ground of defence; and the rule of pleading is not that the issue must be joined on a single fact but on a single point of defence. This was laid down by Lord Mansfield, in *Robinson v. Raley* (a); by the Court of King's Bench, in *O'Brian v. Saxon* (b); and by Mr. Justice Bayley, in the case of *Carr v. Hinchliffe* (c). In each of these cases the facts allowed to be included in one issue, as amounting to a single ground of defence, were several. In the first, the facts that the cattle were commonable and levant and couchant, constituted one proposition, *viz.* that the cattle were entitled to common; in the second, the trading, petitioning creditor's debt, and act of bankruptcy, formed one point of defence, *viz.* the bankruptcy of the plaintiff; and in the last, the fact of the goods, for the price of which the action was brought, being sold by an agent as principal, and a set-off of a debt due from the agent, constituted the defence of payment, or satisfaction of the plaintiff's demand. So, in the present case, the plea contains in substance one ground of defence only—that is, that the *plaintiff was not the bond fide holder for value*, although several facts are necessarily averred as constituting parts of it. Every indorsee of a bill has his own title, and that of each intermediate party; and if he or any of such parties gave value for the bill without fraud, he is a holder for value. The plea, in this case, alleges in

(a) 1 Burr. 316.

(b) 4 D. & R. 579; 2 B. & C. 908.

(c) 7 D. & R. 42; 4 B. & C. 547.

effect that the defendant had no value for making the note, and that neither the first indorsee nor the second received the bill *bond fide*, which is only a statement necessary in point of law of the several facts constituting the defence, that the plaintiff is not a *bond fide* holder for value.

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If this replication were not allowed, some inconvenience would follow; for, in every action on a bill or note, it would be competent for a defendant, by alleging fraud, or such other circumstance as would throw the proof of value on the indorsee, to compel him to prove it: for it would seldom happen that a plaintiff, if he were tied down to dispute one fact, could take issue on such an allegation; and then he would be obliged to take an issue which would admit the fraud, and throw the proof of value on himself, thereby placing him in a worse situation than before the late rules. On the other hand, if this replication be allowed, the indorsee is left in the same situation as he was before, with the additional advantage that he is made acquainted with the defence intended to be set up, which was one great object of the pleading regulations; and he will be called upon to prove value given or not, accordingly as the defendant shall prove or fail in the proof of the allegation of fraud, as he would before under the general issue.

We do not, however, decide this case on the ground of convenience, but in conformity with the established rules of pleading; and we are of opinion that the demurrer must be overruled.

Judgment for the plaintiff.

Lord ABINGER afterwards added, that it was not intended by the new rules of pleading to alter the position of parties; and that if fraud is proved in the first instance, it will have the same effect as before.

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PARKE, B.—The plea here admits value received, but alleges that the plaintiff had notice of the fraud. That issue would lie on the defendant.

BRIGHT v. DURNELL.

The 3 & 4 Will. 4, c. 42, s. 39, does not apply to arbitrators appointed in pursuance of a clause in a deed, that all disputes shall be referred to the arbitration of two persons, who are directed to choose an umpire before they proceed, but which umpire has not been appointed.

CROWDER obtained a rule *nisi*, on behalf of the defendant, for staying proceedings in this cause, and that the plaintiff should pay the costs.

Sir W. W. Follett shewed cause.—From the affidavits it appeared that the plaintiff had entered into partnership with the defendant, and that by the deed of co-partnership it was provided, that if any dispute should arise between them respecting the partnership affairs, such difference was to be referred to the arbitration of two persons, one to be chosen by each, who were to appoint an umpire before they commenced proceedings, and that the causes of complaint were to be reduced into writing; that disputes having arisen, the plaintiff wrote down various causes of complaint against the defendant, alleging that he had been fraudulently inveigled into the partnership; the plaintiff then named an arbitrator, who refused, and the plaintiff appointed another; and the defendant having also named one, the two arbitrators met once for the purpose of appointing an umpire, but they could not agree, and immediately afterwards the plaintiff revoked the authority given to his arbitrator, and arrested the defendant for 200*l.*, for money had and received to the plaintiff's use. Upon an application to Alderson, B., at chambers, to cancel the bailbond, on the ground that any claim the plaintiff might have against the defendant arose out of partnership unsettled accounts, and also on the ground that the plaintiff could not revoke his authority, his Lordship refused to interfere, but recommended an application to the Court. The

deed also contained a clause, that the submission might be made a rule of Court. This Court granted a rule on the second ground only, and refused to set aside the bail-bond. It was contended, in support of the rule, that this was a case within the 3 & 4 Will. 4, c. 42, s. 39, which enacts, that the power and authority of an arbitrator or umpire, appointed in pursuance of any submission containing an agreement that such submission may be made a rule of Court, shall not be revocable by either party, but that the arbitrator or umpire may proceed, notwithstanding such revocation.

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LORD ABINGER, C. B.—I am of opinion, that this is not a case within the act, because an umpire has not been appointed. The agreement contained in the deed was, that the arbitrators should appoint an umpire, which they have not done.

PARKE, B.—I also think that the act does not apply. If the umpire is not appointed, how can we compel the arbitrators to appoint one? and, until he is appointed, the reference cannot go on. It appears to me to be a condition precedent, that an umpire shall be appointed. The act only applies to cases where the arbitrators and umpire are appointed. If these proceedings were stayed, there being no umpire appointed, we might be staying proceedings indefinitely. The rule must be discharged, but without costs.

BOLLAND and GURNEY, Barons, concurred.

Rule discharged, without costs.

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BERRINGTON v. PHILLIPS.

Upon a summons to refer an attorney's bill for taxation, if he intends to insist upon interest under the 3 & 4 Will. 4, c. 42, s. 28, he ought to have it made part of the order that the Master shall allow interest.

MAULE moved for a rule calling upon the defendant to shew cause why a writ should not issue for summoning a jury to assess interest on the bills of costs delivered by the plaintiff under the 3 & 4 Will. 4, c. 42, s. 28, which directs that a jury may allow interest on debts after a demand thereof in writing, and giving notice to the debtor that interest will be claimed. It appeared that the plaintiff was an attorney suing for his bill of costs, and that the usual order had been obtained by the defendant for referring the plaintiff's bill to be taxed, upon the defendant undertaking to pay what was found due; and that the Master had since taxed the costs, but refused to allow interest, because the act only spoke of a "jury."

PARKE, B.—I think this application comes too late. We cannot alter the terms of the order. Perhaps, if we had been applied to in proper time, we might have made it part of the order that the Master should allow interest, as a jury would have done.

ALDERSON, B.—The plaintiff, by accepting the order for taxation in the usual form, without making it a condition that interest shall be allowed, is precluded from taking the benefit of the act.

Rule refused.

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ABBOTT v. ARLETT.

E. V. WILLIAMS applied to set aside a demurrer to the first count of a declaration, as being frivolous. The defendant was sued as the acceptor of a bill of exchange, by the plaintiff as drawer and payee. The count was in the exact form given by the rules of *Trinity Term*, 1 *Will.* 4 (a), with this averment, "which period has now elapsed." The defendant demurred specially, on the ground that it did not appear that the bill was due at the time the action was brought; that the words "now elapsed" refer to the time of declaring, &c. It was contended, that the defendant could not demur to a form of count framed by the judges, and directed to be followed by pleaders.

A demurrer to a count on a bill of exchange, (which was in the exact form given by the rules of *Trinity Term*, 1 *Will.* 4), that the words "now elapsed" did not shew that the bill was due before the action was commenced:—*Held*, not to be "frivolous."

Seem, that it is necessary to shew on the face of the count that the bill became due after the action was commenced.

PARKE, B.—Those forms were published prior to the Uniformity of Process Act, and were correct at that time, because they referred to the time of filing the bill; but now, the commencement of the action has relation to the time of issuing the writ.

Williams.—The form of count was to be the same, whether the action was by bill or original; and therefore, if it is not correct now, it was incorrect then in all actions commenced by original. The count is substantially the same as that which was in use before the new rules.

PARKE, B.—The "forms" were only given as examples: in actions by bill they were correct, even though the bill of exchange became due after the commencement of the action. Those forms do not state the date of the bill, nor does the present declaration: if it had stated when the bill bore date, that would have cured the defect. The form

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which was previously in use had the words "bearing date the — day of ——" I used always to take care that it appeared in the count, that the instrument became due before the action was commenced, and in well-drawn pleadings that ought to appear. I am of opinion, that this demurrer cannot be set aside as being frivolous; and it may be worth while to consider whether the count should not be amended.

BOLLAND and GURNEY, Barons, concurred.

Rule refused (a).

(a) Vide *Stewart v. Layton*, ante, Vol. 3, p. 430; and *Lester v. Jenkins*, 8 B. & C. 338; 2 Man. & R. 429.

Stewart v. Layton, 2 L. R. 33.

CADDELL v. SMART.

The costs of a cause were allowed to be set off against a sum due from the defendant to the plaintiff on another account, but subject to the lien of the plaintiff's attorney: the cause and all matters in difference having been referred, and the arbitrator having ordered a verdict to be entered for the defendant, but found that the defendant was indebted to the plaintiff on other accounts.

TALFOURD, Serjt., shewed cause against a rule which had been obtained by *Ball*, calling on the plaintiff to shew cause why a sum of 100*l.*, the costs incurred in this action by the defendant, should not be set off against a sum of 123*l.* awarded to be paid by the defendant to the plaintiff. The cause and all matters in difference were referred, and the arbitrator ordered a verdict to be entered for the defendant, but found a sum of 123*l.* to be due from the defendant to the plaintiff on other matters not included in the action. It was contended, that this rule could not be granted, because it would interfere with the plaintiff's attorney's lien, amounting to 60*l.*; and *Cowell v. Betteley* (a) was relied on.

Ball, in support of the rule, objected that it did not appear from the affidavit that the attorney's lien was for

(a) 4 M. & Scott, 265; 10 Bing. 432.

costs "in the particular suit," according to the words of the rule (a), but only that 60% were due to him for costs.

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The Court ordered that the rule should be absolute, subject to the attorney's lien, but upon payment of the costs of the application, because the rule prayed too much.

Rule absolute, on payment of costs.

(a) Ante, Vol. 1, p. 196.

HARDING v. FORSHAW.

ADDISON moved to set aside an award.—The reference was of the cause (after issue joined) and all matters in difference, and the submission contained the following clause—that the costs of the suit, and reference, and award, and all other costs, should abide the event, as in the case of a trial at law; and that final judgment shall be entered up for the plaintiff or defendant, according to the award, for any damages or costs awarded to either of them; and that execution might be issued thereon. The arbitrator made his award thus—"I award and find that the plaintiff has no cause of action against the defendant, but the contrary; and I order that the plaintiff pay to the defendant, on &c., 50*l.*, &c." It was objected that the award did not sufficiently shew that the cause was determined, or in what way judgment should be entered up. *Grundy v. Wilson* (a), *Norris v. Daniel* (b), and *Leaming v. Fearnley* (c), were cited. Another objection was also taken to the award, that the action having been brought for commission on the sale of property, the arbitrator, after awarding money to be paid to the defendant on a particular day, as before

A cause and all matters in difference were referred to an arbitrator, the costs to abide the event, as upon a trial at law, and final judgment might be entered up thereon by either party. The arbitrator awarded that the plaintiff had no cause of action, and ordered the defendant to pay a sum of money to the plaintiff; but (he added) it was not intended to prevent the plaintiff from recovering upon an agreement signed by the defendant, but that at present he had no cause of action:—*Held*, that the award was sufficient.

(a) 7 Taunt. 700.

(b) 10 Bing. 507; 4 M. & S. 383, S. C.

(c) 2 Nev. & M. 232; 5 B. & Adol. 403, S. C.

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stated, proceeded thus—"it is not intended to prevent the plaintiff from recovering commission in pursuance of an agreement signed by the defendant, but at present the plaintiff is not entitled to it." There was an affidavit that, whatever commission was due to the plaintiff upon that agreement, was due at the time of the award. It was therefore contended, that the award was in that respect not final, and that it ought to have decided the question one way or the other.

The Court (consisting of PARKE, ALDERSON, and GURNEY, Barons) held, that the award was sufficiently final; that the arbitrator had no power to order a verdict to be entered; and that, by awarding that the plaintiff had no cause of action, the cause was disposed of.

Rule refused.

JOHNSON, Administratrix of STAMFORD, v. HAMILTON.

Circumstances shewing a strong probability of the plaintiff's death before the trial, are no grounds for arresting the judgment, or for staying the *posse* in the hands of the associate: the proper remedy is by writ of error.

THIS was an action of *assumpsit* for wages due to the intestate; and at the trial before Lord Abinger, at the last *Summer Assizes*, the plaintiff recovered a verdict for the full amount claimed. In *Michaelmas Term* last, *Wightman* moved in arrest of judgment, upon affidavits stating that the plaintiff sailed from *Liverpool*, in the brig *Champion*, in the early part of 1835, for *Benin*; that tremendous gales of wind had soon afterwards occurred, and that it was supposed that the ship had been lost in the *Irish Channel*; that a boat and oar had been picked up with the name of *Champion* on them, and great quantities of casks, &c., had been seen floating about, which it was known that the ship had taken out; that the ship had never been heard of, and that the insurers had paid as for a total loss; that the length of the voyage was

usually fifty days, and that other ships had sailed from *Liverpool* for *Benin* since the *Champion* sailed, and had returned; and that it was believed from these circumstances that the plaintiff had died before the trial. The Court, however, held, that this was not a ground for arresting the judgment, and that the proper remedy was by writ of error; but, in order to save the expense of a writ of error, they granted a rule *nisi* for staying the *postea* in the hands of the associate.

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Alexander and *Crompton* shewed cause, and contended that there was no satisfactory evidence of the plaintiff's death upon which the Court could act; and that no presumption of his death could be raised from the short time that had elapsed. They also produced an affidavit from the plaintiff's wife, that she believed her husband was alive; and it also appeared, that though the trial had been put off at the instance of the defendant, from the *Spring* to the *Summer* Assizes, on account of the absence of a material witness, no intimation was given at any time before the trial of the supposed death of the plaintiff; and that no defence was offered at the trial, further than taking some technical objections: it also appeared that the debt had been applied for by letter in *July*, 1834; under these circumstances, the Court, it was urged, would not interfere in a summary way.

Wightman, in support of the rule, contended, that a sufficient case had been made out for the interference of the Court; that there could be no reasonable doubt now of the plaintiff's death; and the presumption was, that he had died before the trial.

LORD ABINGER, C. B.—There may be a great probability of the fact of the plaintiff's death, but the Court ought to be satisfied of it before they interfere in this summary way. The rule must be discharged.

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PARKE, B.—The defendant has the power, by law, of availing himself of such a fact, either by plea in abatement, or writ of error. There is nothing to prevent him from now bringing a writ of error, if he can establish the fact by legal evidence. The defendant is asking a favour, and I think that, under the circumstances, this is not a case in which the Court ought to interfere summarily.

BOLLAND, B., concurred.

Rule discharged, without costs.

JERVIS v. DEWES.

Where a country attorney, a defendant in a cause, not being an attorney of this Court, defended in the name of a *London* agent, who was an attorney of this Court, and the defendant attended the assizes in person, and the plaintiff was nonsuited:—*Held*, that the defendant was entitled to his fees for attending the trial, drawing briefs, &c., as all the business must be considered to have been done in the name of the *London* agent.

WHITEHURST shewed cause against a rule which had been obtained by *Humfrey* for reviewing the Master's taxation. The defendant was an attorney practising in the country, and was not an attorney of this Court, but he employed a *London* agent, who was an attorney of this Court, and whose name appeared on the record as attorney for the defendant. The defendant, however, conducted the cause in person at the assizes, and the plaintiff was nonsuited. The Master, on the taxation of costs, allowed the defendant the usual attorney's fees for attending the trial, drawing briefs, &c. In answer to the rule, it was urged that, as the defendant practised in the name of an attorney of this Court, the taxation was correct. On the other hand, it was contended that he was not entitled to charge for what he did at the assizes in person, but only for the business which was transacted by means of the *London* agent; and *Leaver v. Whalley* (a), and *Latham v. Hide* (b), were cited.

Per Curiam.—The rule must be discharged. There

(a) Ante, Vol. 2, p. 80. (b) Ante, Vol. 1. p. 594; S. C. 1 C. & M. 123.

was the name of an attorney of this Court upon the record; all that was done, therefore, by the defendant, must be considered as done by him through the *London* agent.

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Rule discharged, with costs.

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BARSTOW had obtained a rule *nisi* for setting aside this attachment, on payment of costs.

Jervis, on shewing cause, objected to the affidavit. One of the deponents was a marksman, and the *jurat* was thus—"Sworn by the above-named *W. A.*, &c; *John Pullen*, gentleman, having been first sworn that he had read over and explained the affidavit to the said *W. A.*, and that he, *W. A.*, understood it."

An affidavit of a marksman, which expresses in the *jurat* that *A. B.* had been first sworn to the fact that he had read over and explained the affidavit to the marksman, and that he understood it, is insufficient; the officer himself ought to explain it.

PARKE, B.—That is insufficient. It ought to have been read over and explained to him by the officer.

Where an arrest took place on the 5th of January, and bail was put in on the 12th, and the body-rule expired on the 20th:—*Held*, that an attachment obtained in Hilary Term might be set aside, without its standing as a security, as the plaintiff had not been prevented from entering his cause for trial in the term next after the return of the writ.

This objection being waived, to save expense, *Jervis* contended that the attachment ought to stand as a security. The arrest was on the 5th of January; on the 12th bail were put in, who were excepted to on the 15th; and on the same day the plaintiff declared *de bene esse*. The body-rule expired and the bail ought to have justified on the 20th; on the 21st the attachment was obtained, and on the 25th the coroner was ruled.

Barstow cited the rule of Hilary Term, 2 Will. 4, r. 5 (a), which directs that the attachment shall stand as a security if the plaintiff has declared *de bene esse*, and has

(a) Ante, Vol. 1, p. 190.

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been prevented, for want of bail, from entering his cause for trial in the term *next after that* in which the writ is returnable."

Lord ABINGER, C. B.—That term has not yet arrived.

Per Curiam.—The rule must be absolute, without the attachment standing as a security.

Rule absolute, on payment of costs.

MARSHALL v. WHITESIDE, and ELEONORE VICTORINE, his Wife.

A plea of payment into Court upon two breaches in covenant, jointly, is good, without specifying how much is intended to be applied to each breach.

A declaration upon a covenant, whereby *A.* and *B.* jointly and severally covenanted to repair during the term, alleged as a breach, that neither *A.* nor *B.*, whilst the latter was unmarried, nor *A.*, nor *B.*, nor *C.* her husband, since the marriage of *B.* with *C.*, did repair during the term, &c. A plea that *A.* and *B.* and *C.* did, during the term, repair, &c., is bad on special demurrer.

COVENANT.—The declaration stated a deed made between the plaintiff of the one part, and *Arabella Gaudard* and the defendant *Eleonore Victorine*, before her marriage with the other defendant, of the other part, by which the plaintiff demised certain premises to *Arabella* and *Eleonore* from the 25th of *March*, 1828, for twenty-one years, determinable at the end of the first seven years. Covenant by *A.* and *V.* jointly and severally to paint the outside once within every third year, or oftener if necessary, and also within every seventh year to paint the inside, &c., and keep in repair the whole of the premises. Averment, that the two defendants intermarried, and that the lessees determined the term at the end of the first seven years. Breach, that the said *A. G.*, and the said defendant *E. V.*, did not, nor would, whilst the said defendant *E. V.* was sole and unmarried, nor did nor would the said *A. G.* and the said defendants, after the intermarriage of the said defendants, at their costs and expenses, within every third year during the continuance of the first seven years of the said term, paint the outside wood and iron work, &c. There were other breaches for not painting the inside of the house, &c., and for not repairing.

Plea to the first breach, that *Arabella* and the defendants did, within every third year during the continuance of the first seven years of the term, paint, &c. *Plea* of performance in the same form to the second and third breach. And as to the alleged breaches of covenant by the said plaintiff, fourthly and lastly above assigned, the said defendants say that the said plaintiff ought not further to maintain her action in that behalf, because the said defendants now bring into Court the sum of 90*l.*, ready to be paid to the said plaintiff; and the said defendants further say, that the said plaintiff has not sustained damages to a greater amount than the said sum of 90*l.*, in respect of the said breaches of covenant fourthly and lastly above assigned. And this the said defendants are ready to verify; wherefore they pray judgment if the said plaintiff ought further to maintain her said action in that behalf.

Special Demurrer to the first plea, that the defendants do not traverse the non-performance of the covenant by the said *Arabella* and the said defendant *Eleonore*, whilst the said *Eleonore* was sole and unmarried, but in their said first plea allege that the said *Arabella Gaudard* and the said defendants performed the said covenant, which is a different and larger issue than that tendered by the said plaintiff; and, as it appears in and by the said declaration that the said defendants intermarried on the 1st day of *January*, 1834, it becomes an immaterial and irrelevant issue, and ought not to have been taken by the said defendants; and for that, although the said defendants, by the said plea, profess to answer the whole of the breach of covenant by the said plaintiff first above assigned, yet the said plea in fact answers only a part thereof—namely, the breach of covenant committed by the said *Arabella Gaudard* and the said defendants, after the intermarriage of the said defendants, but leaves wholly unanswered the breach of the said covenant in the said declaration alleged to have been committed by the said

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Arabella Gaudard and the said defendant *Eleonore Victorine*, before her intermarriage with the said defendant, *William Whiteside*; and also that the said defendants have not, in and by their said plea, denied or confessed and avoided the said breach of covenant in the said declaration first above assigned, &c.—Similar demurrer to the pleas to the next two breaches.

The demurrer to the plea to the fourth and last breaches assigned as causes, that the said defendants should have stated and shewn in and by their plea how much and what part of the said sum of 90*l.*, which the said defendants bring into Court, is intended to be brought into Court and paid on account of the damages sustained by the said plaintiff by reason of the breaches of covenant by the said plaintiff fourthly above assigned; and how much and which part of the said sum of 90*l.* to the said breach of covenant by the said plaintiff lastly above assigned. But, by the said defendants bringing the said money into Court, and paying the same in respect of the whole of the breaches of covenant by the said plaintiff fourthly and lastly above assigned, the said plaintiff cannot safely reply to the said plea, or take issue thereon.

Ogle, in support of the demurrer.—The pleas to the first, second, and third breaches are, no answer to them; they are neither in the words of the breaches, nor are they so extensive. The plea of payment into Court is also bad, because it is pleaded to two breaches, on each of which the plaintiff would be entitled to general damages. This objection was taken on demurrer to a similar plea in a case in the *King's Bench*, and that Court held the objection to be fatal. The plea is founded on the late act of 3 & 4 *Will.* 4, c. 42, s. 21, which allows money to be paid into Court, by way of compensation, in actions for unliquidated damages; the defendant, knowing how much he intends to pay in on each breach, ought to specify the

amount in the plea; if he is allowed to pay it in generally, great uncertainty will be induced, because it will be impossible to say upon how many of several issues each party will be entitled to a verdict. Neither does the plea follow the form (a), which mentions "*cause of action*."

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Crowder, contra.—The decision of this Court, in *Jourdain v. Johnson* (b), is at variance with the decision of the *King's Bench*: the correctness of the present plea of payment is supported by analogy to the old mode of paying money into Court, which might be general upon several counts, without specifying how much upon each; and the old plea of tender was also framed in the same general way. The pleas to the first three breaches are sufficient pleas of performance, and the plaintiff might safely have taken issue upon them.

LORD ABINGER, C. B.—It appears to me, that the plea of payment is sufficient. The generality of the plea appears rather to give an advantage to the plaintiff than otherwise.

PARKE, B.—I also think that the plea of payment into Court is sufficient. The form of plea given by the rules is directed to be followed, as near as can be, *mutatis mutandis*, and therefore the objection arising from the expression "*cause of action*" in the form cannot prevail. Formerly, when money was paid into Court without pleading it, it was paid in generally, without specifying how much on each count. If there is an inconvenience in allowing money to be so paid in, there is also an inconvenience in compelling a defendant to specify the exact amount upon each count or breach; no new inconvenience is suggested as likely to arise since payment into Court has been ordered to be pleaded. Here, the money was paid in under

(a) R. G. 4 Will. 4, s. 17; ante, Vol. 2, p. 320.

(b) Ante, p. 534.

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a Judge's order, and there is, therefore, less reason for any objection now, because the plaintiff might have opposed the order, and suggested any particular inconvenience to the Judge. My Brother *Patteson* has informed me, that he is not satisfied with the decision which the Court of *King's Bench* came to in the case cited; and it appears to me, that there is no reason why we should require greater strictness now, because payment must be pleaded, than we did formerly; and this Court has already expressed that opinion in *Jourdain v. Johnson*. The plaintiff, therefore, had better amend and withdraw his demurrer; the defendant also will have leave to amend the first three pleas, which, though they answer the first three breaches substantially, are not correct in form.

Both parties had leave to amend on the usual terms.

BURLEY v. STEVENS.

Where there is a doubt about the validity of an award, the Court will neither set it aside nor grant an attachment, but leave the party to bring an action: *secus*, when a verdict has been taken.

The time for making an award being limited to the 18th of *April*, with power to enlarge the time, but not stating how the arbitrator, at a meeting on the

16th, in the presence and with the consent of all parties, appointed the 29th of *June* for a further meeting:—*Held*, to be a sufficient enlargement of the time.

The 3 & 4 *Will.* 4, c. 42, s. 39, is general as to the power of the Court to enlarge the time for making awards.

THIS was an application to set aside an award, under these circumstances:—The cause and all matters in difference were referred, and the time for making the award was limited to the fourth day of *Easter Term*, 1835, (*April* 18th). There was a meeting on the 16th, and the whole case was then gone through; but the defendant suggesting that he could produce new evidence, and the plaintiff desiring to give evidence in reply, it was agreed in the presence of all parties that there should be a further meeting on the 29th of *June* following. The arbitrator was empowered by the submission to enlarge the time, but no particular mode of enlarging it was pointed out, and the time limited for making the award (*April* 18th) passed by without the time being enlarged further than

by the 29th of *June* being appointed, as before mentioned. In *Trinity* Term an application was made to the Court to compel the parties to agree to an enlargement of the time by the arbitrator in the usual way, but the Court declined granting any rule (a). On the 29th of *June* the arbitrator attended, and also the plaintiff; but the defendant did not attend, as he objected to the arbitrator's authority. The arbitrator made his award on that day, ordering the verdict entered for the plaintiff to be reduced to 95*l.*, and also other sums to be paid by the defendant.

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Alexander shewed cause against the rule.—He contended that the time had been virtually enlarged, though not formally, and that the defendant should have objected when the arbitrator fixed the 29th of *June*, and the latter would then have had an opportunity of enlarging the time in the usual way. He relied upon *The King* (in aid of *Mytton*) against *Hill* (b), in which the Court refused to set aside an award, because it was made after the time limited for making it, where it appeared that the defendant had acquiesced. He also cited *Wilkinson v. Tyne* (c), where *Coleridge, J.* granted a rule for signing judgment, unless the defendant consented to the enlargement of the time.

Martin, in support of the rule, contended that there had been, in fact, no enlargement of the time, and that there ought to have been some instrument in writing.

The Court said, that where there was any doubt about the validity of an award, they ought not to set it aside, neither would they grant an attachment, but leave the plaintiff to bring an action, in which the validity of the award might be raised upon the record.

(a) See the case, ante, p. 255.

(b) 7 Price, 636.

(c) Ante, p. 37.

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PARKE, B., added, that if the former application in this case had been made after the case of *Potter v. Newman* (a) had occurred, he should have granted the rule under the clause contained in the 3 & 4 *Will.* 4, c. 42(b), the Court having in that case expressed a strong opinion that the power given to them by that act to enlarge the time for making awards was general. His Lordship said that he had since satisfied his mind that the clause was general, and ought not to be confined to cases where one party had improperly revoked the submission.

ALDERSON, B., said, he agreed with the observations of Mr. Baron Parke.

It being suggested that the plaintiff was proceeding to enforce payment of the award by issuing execution on the judgment, the rule was ordered to stand over for a few days. On a subsequent day, Parke, B., said, that the Court had looked into the authorities, and were of opinion that the agreement by parol to the time being enlarged was sufficient; that there being no direction as to the mode of enlarging the time, and the arbitrator having, in the presence of both parties, fixed the 29th of *June*, that of itself was a sufficient enlargement of the time; and they were of opinion that the award was good, and that the rule should be discharged.

Rule discharged.

(a) *Ante*, p. 504.

(b) S. 39.

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A plaintiff, administrator, who is nonsuited, is not liable to costs, under the 3 & 4 Will. 4, c. 42, s. 31, unless he can establish a clear case of exemption, by shewing that he has made due inquiries, and that the defendant has been guilty of some misconduct, by withholding information when applied to. *Godson v. Freeman*,

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1. Where a rule has been obtained on an affidavit which is defective, in not having a proper *jurat*, the party moving cannot, when cause is shewn, and the objection taken, remove the effect of it, by producing a fresh affidavit similar to the first, with a proper *jurat*; the proper way is to re-swear the original affidavit, and the Court will enlarge the rule for that purpose, or allow the new affidavit to be filed. *Goodricke v. Turley*, 392

2. It is no objection to an affidavit, that it is sworn before the attorney in the cause, unless it expressly appears that he was the attorney at the time the affidavit was sworn. *Baumont v. Dean*, 354

3. Affidavits in answer to a rule enlarged from one term to another which requires the affidavits to be filed a certain time before the term, must in all cases, notwithstanding a

contrary practice has prevailed, be filed within the time prescribed, unless the party is prevented filing them by *inevitable accident*. *Turner v. Unwin*, 16

4. Upon a reference to an arbitrator, "the costs to abide the event, who was to say by whom and when to be paid," he awarded a sum to the plaintiff, and divided the costs between him and the defendant. The plaintiff, treating the award in respect of the costs as void, threatened to issue execution for the debt and costs, upon which the defendant prepared affidavits of the facts, (before judgment was signed), and after it was signed made another affidavit of that fact, and moved upon all the affidavits to set aside the judgment:—*Held*, that the first affidavits were good, though sworn before judgment was signed. *Read v. Massie*, 681

5. On shewing cause against a rule, when an objection is taken to the insufficiency of the affidavits in support of the rule, the counsel shewing cause must at once elect whether he will use his affidavits in answer to the rule or not.

Affidavits in support of a rule to set aside proceedings must shew a clear case for relief; and, therefore, where it was moved to set aside a judgment on the ground that the accounts between the parties had been investigated and found to be incorrect, and that the plaintiff had agreed that any error should be rectified:—*Held*, that the affidavits were insufficient in not stating that the error was in the amount.

Where a rule is discharged on a technical objection taken to an affidavit, without going into the merits, no costs are allowed. *Preedy v. Lovell*, 671

6. If the words "before me," in the *jurat* of an affidavit, are struck out, and the words "by the Court"

introduced, it is not an objection. *Austin v. Grange*, 516

7. The Christian names of the parties in a cause must be written *at length* in the title of an affidavit. *Masters v. Carter*, 577

8. An affidavit of a marksman, which expresses in the *jurat* that *A. B.* had been first sworn to the fact that he had read over and explained the affidavit to the marksman, and that he understood it, is insufficient; the officer himself ought to explain it. *Rex v. The Sheriff of Middlesex*, 765

9. If a rule is moved without affidavits, none can be used in answer to it. *Atkins v. Meredith*, 658

AFFIDAVIT (FILING).

See AFFIDAVIT, 3.

Affidavits to shew cause against an enlarged rule must be filed a week before the term to which it is enlarged. *Gilson v. Carr*, 618

AFFIDAVIT (INTITLING).

See ATTACHMENT, 11—JUDICIAL NOTICE, 1.

1. "*Casley*, assignee, &c.," is not a sufficient description of the plaintiff in the title of an affidavit. *Casley v. Smyth*, 477

2. In intitling an affidavit, the parties should be described as "plaintiff" and "defendant." *Harris v. Griffith*, 289

3. In an action against the defendant and bail, on a bail-bond, the affidavits in support of a rule for setting aside proceedings may be intitled either in the original action, or in that against the bail. *Stride v. Hill*, 709

AFFIDAVIT (OF DEBT).

See DECLARING (AGAINST ONE OF TWO)—DEFENDANT, 1, 2—LACHES, 4—WAIVER, 4.

1. An affidavit of debt claiming interest, must shew that it accrued pursuant to agreement.

An affidavit of debt, bad as to part, is insufficient. *Drake v. Harding*, 34

2. An affidavit of debt made by assignees of a bankrupt, claiming a certain sum for money lent, paid, &c., by the bankrupt to and for the use and at the request of the defendant, "and for interest thereon agreed to be paid" by the defendant, is sufficient. *Harrison v. Turner*, 72

3. In an affidavit of debt against the drawer or indorser of a bill of exchange, it is sufficient to allege a default by the acceptor, without averring a presentment or notice. *Witham v. Gompertz*, 382

4. An affidavit of debt sworn on the 9th of April, upon which a *capias* issued into Surrey, and afterwards another *capias* into Middlesex, and on 5th of November, an *alias capias* into Surrey:—*Held*, that, as the same officer acted for both counties, an arrest upon the last writ was regular.

An affidavit is not considered stale till it is a year old. *Ramsden v. Maughan*, 403

5. Where a writ of *capias* was issued on a good affidavit of debt, and afterwards another *capias* into another county upon a defective affidavit, on which the defendant was arrested:—*Held*, that the arrest was regular, as the first affidavit, being sworn before the same officer who issued both writs, would warrant the issuing of the second writ without a fresh affidavit.

Semble, that prisoners are not bound by the same strictness as to the time for making objections, as applies to persons at large. *Rock v. Johnson*, 405

6. In an affidavit of debt on a bill of exchange, by indorsee against the

drawer, it is not necessary to state the default of the acceptor, or that notice thereof was given to the drawer. *Irving v. Heaton*, 638

7. An affidavit of debt on a bill of exchange need not state the date of the bill, if it allege it to be unpaid. *Ib.*

AFFIDAVIT (OF SERVICE).

An affidavit of service must swear to the service of the "rule annexed," and not merely of the "rule in this cause." *Fidlett v. Bolton*, 282

AFFIDAVIT (USING).

See AFFIDAVIT, 9.

After a Judge has made an order at chambers, an application to the Court to set aside that order may be made upon the same affidavits as were used before the Judge at chambers. *Pickford v. Ervington*, 453

ALLOCATUR.

See SECOND ATTACHMENT, 1.

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See AFFIDAVIT, 6—BILL OF EXCHANGE, 1—*CAPIAS*, 2—*SUMMONS*, 5—*WRIT* (ALTERATION OF).

AMENDMENT.

See APPEARANCE—*SCIRE FACIAS*, 3—*WAIVER*, 1—*WRIT OF TRIAL*, 6.

In debt on a recognizance of bail, the declaration stated the recognizance to have been entered into in an action of debt against J. S. On the production of the record, (on a plea of *nul tiel record*), it appeared that the original action was on promises. The Court allowed the declaration to be amended, on payment of costs, but required a special application for

that purpose, and would not permit it to be made to prevent the defendant from obtaining judgment. *Munkenbeck v. Bushnell*, 139

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See *DECLARING (TIME FOR)—DISTINGUISHING*, 1, 2, 5—*NON PROS—SERVICE (OF PROCESS)—WAIVER*, 3.

If a defendant enters an appearance in due time, which is irregular on account of a mistake in the name, the proper course for him to pursue is to apply to amend that appearance, and not to enter a new one. *Bate v. Bolton*, 677

APPROPRIATION.

See *ATTORNEY AND CLIENT*, 3.

ARBITRATION.

See *AFFIDAVIT*, 4—*COSTS*, 2, 8—*COSTS (IN THE CAUSE)*, 2.

1. Applications to set aside awards made under a Judge's order of reference are now put on the same footing as to time as if the awards were made under the 3 & 9 *Will.* 3; but if the party affected has not notice of the award sufficiently early to enable him to move within the time allowed by the act, he may move to set it aside in the term next after the notice.

A reference was made to two arbitrators, and an umpire to be chosen by them, who was to be present and decide each matter of reference as it might arise, and either might make an award. The umpire, in the presence of the arbitrators, disallowed the

plaintiff part of his claim, which made the balance in favour of the defendant; and afterwards, without notice to the arbitrator or defendant, made his award in favour of the plaintiff. The Court set aside the award.

Whether the 3 & 4 *Will.* 4, c. 42, s. 39, applies to all arbitrations, so as to enable a Judge to make an order for enlarging the time beyond what the parties had agreed upon, and without any clause to that effect in the submission, or only to cases where one party has improperly attempted to revoke the arbitrator's authority—*Query?* *Potter v. Newman*, 504

2. Where a cause was referred to an arbitrator, who, at a meeting, at which the plaintiff and defendant were present, appointed a future day for another meeting, but which day was beyond the time allowed for making the award, and the arbitrator by accident omitted to enlarge the time for that purpose, the Court refused to interfere by making a rule to extend the time for making the award to the day named. *Burley v. Stevens*, 255

3. Where a defendant submitted all matters in difference to arbitration, and the arbitrators required him, in pursuance of a power given to them for that purpose, to produce certain books and papers, and an attachment was moved for against him for not producing them:—*Held*, that he could not by affidavit bring before the Court the question whether those books related to matters in difference between them, or not; though it was expressly sworn that the books merely related to old accounts which had been long since settled, and which it had been agreed between them should form no part of the reference, because by the general terms of the submission of all matters in difference it was left in the discretion of the

arbitrator to say what were matters in difference and what were not. *Arbuckle v. Price*, 174

4. An award made in pursuance of an order of *Nisi Prius*, referring a cause and other matters in difference, may be objected to at any time before the end of the term next after publication.

In stating the grounds on which it is sought to set aside an award, it is not sufficient to state a general head of objection, as "misapprehension of the terms of the reference." *Allenby v. Proudlock*, 54

5. Where, in an action of trespass, the time for making an award pursuant to an order of *Nisi Prius* expires before the award is made, and the arbitrator has not enlarged the time, as empowered by the order, the Court will under certain circumstances direct judgment to be signed and execution issued for the sum for which the jury find, subject to the reference, unless the enlargement is consented to. *Wilkinson v. Time*, 37

6. The 3 & 4 *Will.* 4, c. 42, s. 39, does not apply to arbitrators appointed in pursuance of a clause in a deed, that all disputes shall be referred to the arbitration of two persons, who are directed to choose an umpire before they proceed, but which umpire has not been appointed. *Bright v. Durnell*, 756

7. An arbitrator's decision on the admissibility of evidence before him is final. *Symes v. Goodfellow*, 642

ARREST.

See AFFIDAVIT (OF DEBT), 5—DEPONENT (RESIDENCE OF), 1—LACHES, 5—RENDER, 4.

1. The Court refused to discharge the defendant out of custody, where he had been arrested by a party not having the warrant in his possession, and had been taken out of the county and detained there two days, the ap-

plication for relief not having been made until twenty-three days after the arrest. *Fownes v. Stokes*, 125

2. The fee payable by law to the officer from the party arrested, is 4d. only, the fee prescribed by the 23 *Hen.* 6, c. 9. *Innes v. Levy*, 116

3. It is no objection to an arrest, that it takes place in a gaol, if a defendant is there for his own purposes. *Loveitt v. Hill*, 579

ARREST (WITHOUT PROBABLE CAUSE).

1. Where the reduction of the plaintiff's claim was occasioned by a dispute as to the right of the defendant to claim a set-off:—*Held*, that, though the arbitrator awarded in favour of the defendant in respect of the set-off, and thereby reduced the plaintiff's claim a third, that the defendant was not entitled to his costs under the 43 *Geo.* 3, c. 46, s. 3. *Canthorne v. Canthorne*, 182

2. On an application for defendant's costs under the 43 *Geo.* 3, c. 46, s. 3, the onus of proving that the arrest was without reasonable and probable cause lies on the defendant, and the Court will not inquire whether the finding of the jury was correct. *Twiss v. Osborne*, 107

3. In order to obtain costs under the 43 *Geo.* 3, c. 46, s. 3, it is not necessary to shew that the arrest was malicious. *Ib.*

4. Where a defendant was arrested for 20*l.* and upwards, and the jury gave only 17*l.* 19*s.*:—*Held*, that the defendant was entitled to costs under the 43 *Geo.* 3, c. 46, s. 3, it appearing that the plaintiff had first sent in a bill for the above sum, and had afterwards added 2*l.* 2*s.* for goods supplied, which had been returned as unsuitable, there being reason to believe that the plaintiff had added that sum to make up an arrestable amount. *Sutton v. Burgess*, 376

778 ASSAULT AND BATTERY.

ASSAULT AND BATTERY.

See NEW ASSIGNMENT—PLEA, 23.

ASSIGNEE.

See AFFIDAVIT (INTITLING), 1—AFFIDAVIT (OF DEBT), 2—ATTORNEY AND CLIENT, 1—DECLARATION, 6—PLEA (SEVERAL), 2—RELEASE.

ASSIGNEE (OF DEBT).

See ATTORNEY (AUTHORITY OF).

ATTACHMENT.

See AWARD 2, 6—CHARGING IN CUSTODY—RENDER, 1—SUBPÆNA.

1. A rule for an attachment, for any other cause than the non-payment of money pursuant to the Master's allocatur, is only nisi in the first instance. *Richmond v. Bowdidge*, 749

2. If money is ordered to be paid to a certain person (not an attorney) or his agent, the demand must either be made by himself or some one authorized by a power of attorney. *Brown v. Jenks*, 581

3. The rule for an attachment for non-payment of a sum of money found due by an attorney to his client, on a reference to the Master, pursuant to a rule of Court, is nisi in the first instance. *Ryan v. Furnell*, 582

4. Where a reasonable time had not been given between the day of serving a rule for an attachment and the day of shewing cause, the Court, on making the rule absolute, directed the attachment to lie in the office a few days, until notice of that step being taken should be given to the defendant. *Rex v. Giles*, 569

5. Under certain circumstances, where there is reason to believe that the copy rule, and allocatur, have come to the knowledge of the defendant, an attorney, a rule nisi for an

ATTACHMENT.

attachment will be granted, although strict personal service has not been effected. *Rex v. Dignam*, 359

6. In the C. P. two motions are necessary to make a Judge's order a rule of Court, and for an attachment for disobedience thereto. *Pilcher v. Woods*, 329

7. If an award directs a document to be delivered to three persons, they must all make the demand at the same time, or execute a power of attorney authorizing one person to make it, so that the defendant may know the demand to be made by their joint authority. *Sykes v. Haigh*, 114

8. An application to make a Judge's order a rule of Court, and for an attachment for disobeying it, may be made on the same motion. *Hinchliffe v. Jones*, 86

9. An application for an attachment for disobedience to a subpœna must in all cases be made promptly, and therefore a rule for an attachment for not obeying a subpœna to attend on the trial of an indictment on the 11th of December was discharged, because it had not been moved for until the 23rd April following. *Rex v. Stretch*, 30

10. *Semble*, that it is not necessary that a witness should be called on his subpœna in order to bring him into contempt. *Ib.*

11. Affidavits in answer to an application for an attachment in a criminal case should not be entitled in it unless the record is in the King's Bench, but should be entitled in the Court only. *Ib.*

12. If a rule of Court requires a client to pay a certain sum of money, an attachment cannot be obtained against his attorney for its non-payment. *Poole v. Watkins*, 11

13. It is sufficient to have one rule for making a Judge's order a rule of Court, and for an attachment thereon. *Forster v. Kirkwall*, 370

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14. In order to obtain an attachment for non-payment of costs, the rule for the payment of them, as well as the rule *nisi* for an attachment for non-payment, must be personally served. *Birket v. Holme*, 556

15. If facts are stated in support of an application for an attachment, from which it may be presumed that the person sought to be served has received notice of the contents of the rule and *allocatur*, and of the demand thereon, and on shewing cause against the rule such knowledge is not denied, the Court will direct the attachment to issue. *Bottomley v. Belchamber*, 26

ATTACHMENT (SETTING ASIDE).

1. A motion for setting aside a regular attachment against the sheriff for not bringing in the body on payment of costs, must be supported by an affidavit that bail above have justified, or that the defendant has been rendered. *Rex v. The Sheriff of Lincolnshire*, 455

2. It is not necessary for the purpose of such a motion, that the bail should deny collusion, &c., if the defendant swears that he has a good defence to the action on the merits. *Ib.*

ATTACHMENT (STANDING AS SECURITY).

BAIL, 10.

1. The Court ordered an attachment against the sheriff to stand as a security, where, had bail been duly put in and perfected, the plaintiff might have set down the cause for the sittings in the term, notwithstanding the accidental circumstance of there being at the time no place for the trial of causes in *C. P.* in term. *Rex v. The Sheriff of Middlesex*, 142

2. Where an arrest took place on

ATTORNEY, &c. 779

the 5th of January, and bail was put in on the 12th, and the body-rule expired on the 20th:—*Held*, that an attachment obtained in *Hilary Term* might be set aside, without its standing as a security, as the plaintiff had not been prevented from entering his cause for trial in the term next after the return of the writ. *Rex v. The Sheriff of Middlesex*, 765

ATTESTING WITNESS.

See WARRANT OF ATTORNEY, 5.

ATTORNEY.

See AFFIDAVIT, 2—ATTACHMENT, 2, 5—COGNOVIT, 1, 2—CORPORATOR—INDORSEMENT (ON PROCESS), 1—LORDS' ACT, 1—NOTICE (OF COUNTERMAND)—NOTICE (TO PRODUCE), 1, 2—PERSON (APPEARANCE IN)—PROCEEDINGS (SETTING ASIDE), 2—SCIRE FACIAS, 4—SMALL DEBTOR, 3, 6—SUMMONS, 2, 3, 4—UNIFORMITY OF PROCESS ACT.

An attorney cannot be ordered to pay the costs of an unsuccessful application to which he is not a party except upon special motion. *Cheslyn v. Pearce*, 693

ATTORNEY (ADMISSION OF).

1. Where an attorney has given notice of his intention to apply for admission on the first day of a term, and it appears that some of the necessary entries have not been made, through the neglect of an agent, in due time for that term, but have been made two days before it, the Court will allow him to be admitted on the last day of term, the entries continuing, and the notices being duly altered. *Ex parte Woolright*, 274

2. Where an attorney applies for admission, it must be positively shewn that his notice has been regularly put up in the *King's Bench* office. *Ex parte Morgan*, 296

3. Admission of attorney without a term's notice, under particular circumstances, for the purpose of practising in *New South Wales*. *Ex parte Hulme*, 88

ATTORNEY AND AGENT.

See ATTACHMENT, 2 — ATTORNEY (ADMISSION OF), 1—COSTS, 9.

ATTORNEY (AUTHORITY OF).

An assignee of a debt has a right to use the assignor's name in suing for it, and it is a sufficient authority for the attorney, if he is instructed by the former to commence proceedings. *Pickford v. Ewington*, 453

ATTORNEY (BILL OF).

See ATTORNEY AND CLIENT, 10—CREDIT (FOR SUMS RECEIVED), 2—INTEREST.

1. In an action on an attorney's bill, the defendant cannot, after being let in to plead to the merits, plead that no signed bill has been delivered.

Quære, whether such a defence can be given in evidence under the general issue. *Beck v. Mordaunt*, 112

2. An assignee of an insolvent attorney is entitled to recover the bills of costs due to the estate, without delivering signed bills, according to the directions of the 2 *Geo.* 2, c. 23.

Whether a bill delivered by an attorney, without mentioning the Court in which the business is done, is a sufficient compliance with the 2 *Geo.* 2, *quære*. *Semble*, that it is. *Lester v. Lazarus*, 397

3. A client is entitled to have his attorney's bill taxed, although he may have expressed his satisfaction at the bills, paid a sum on account, and allowed four years to elapse from the delivery of the bills before he applies for an order to tax. *Woollaston v. Weston*, 3

ATTORNEY AND CLIENT.

ATTORNEY'S CLERK.

See DEPONENT (RESIDENCE OF), 3.

ATTORNEY AND CLIENT.

See ATTACHMENT, 3, 12—ATTORNEY (BILL OF), 3 — CORPORATOR — COSTS, 8, 9—CREDIT (FOR SUMS RECEIVED), 2—JUDGMENT (BY DEFAULT)—LIEN—SMALL DEBTOR, 3, 6.

1. Where a client has deposited deeds in the hands of his attorney, and the latter afterwards becomes bankrupt, the Court will not summarily interfere to compel the assignees to deliver up those deeds which have come to their hands from the bankrupt. *Ex parte Roy*, 573

2. Where a rule for the review of the Master's taxation of an attorney's bill has been disposed of, the Court will not afterwards entertain a motion impugning the bill on the ground of certain charges having been improperly introduced into it instead of the cash account. *Harrison v. Ward*, 39

3. An attorney has a right to introduce into his bill disbursements made by him for his client, although he has no discretion as to their amount, if there is no specific appropriation of money paid by his client to him to such disbursements. *Ib.*

4. The Court has no direct power to refer an attorney's bill for taxation except under the authority of the 2 *Geo.* 2, c. 23. *Howard v. Groom*, 21

5. An attorney does not waive his right to object to the jurisdiction of the Court directly to refer his bill for taxation by attending its taxation before the Master, on which, according to the statute, he would be liable to pay the costs of taxation, the client not having given the undertaking required by the statute to pay what should be found due. *Ib.*

He will, however, be liable to re-

fund what should be found overpaid on such taxation. *Ib.*

6. It is no answer to an application to tax an attorney's bill that an agreement has been made that the attorney shall receive one half of the proceeds of a suit carried on at the instance of the client. *In re Masters*, 18

7. If a party successfully resists an action by an attorney plaintiff for costs, on the ground of his never having been employed as his attorney, he cannot afterwards summarily compel the attorney to give up documents which have come to his possession in the course of the business, for doing which the action was brought. *Ex parte Maxwell*, 87

8. The Court has no direct power to order an attorney's bill to be taxed, independent of 2 Geo. 2, c. 23. *Palmer v. Roe*, 95

9. The Court cannot direct a bill to be taxed at the instance of any person but the client. *Ib.*

10. If various matters form but one transaction, some being at law, and others for conveyancing, one bill only ought to be made out. *Ib.*

11. Where a client has voluntarily paid money to his attorney, pursuant to an agreement, in itself void for champerty, the Court will not, after a lapse of thirteen years, interfere to compel the attorney to refund or deliver his bill, unless sufficient reason is shewn for not making an earlier application. *Ex parte Yeatman*, 304

12. An attorney having brought an action for his bill of costs, which was defended by the client, on the ground of negligence, was ordered to give to the defendant a copy of a case, with the opinion of counsel thereon, (which had been procured for the defendant by the plaintiff as his attorney), at the defendant's expense, or to deliver up the case itself on being paid the costs which the plaintiff claimed in respect of such

case and opinion. *Evans v. Deegal*, 374

13. An attorney is entitled to recover from an insolvent costs incurred in endeavouring to sell property of the latter, while he is in prison, and taking the benefit of the act, if done *bonâ fide*, and the insolvent has derived some benefit from it. *Tabram v. Warren*, 545

ATTORNEY (PRIVILEGE OF).

1. An attorney plaintiff, though he does not describe himself as attorney on the record, does not, since the Uniformity of Process Act, lose his privilege of suing in the superior Courts, or subject himself to the operation of Court of Requests' Acts. *Wright v. Skinner*, 745

2. An attorney is not within the Court of Requests' Acts, so as to deprive him of his privilege of suing in the superior Courts at Westminster, unless it is so enacted in them, notwithstanding the Uniformity of Process Act. *Dyer v. Levy*, 630

ATTORNEY (RE-ADMISSION OF).

1. A notice by an attorney on the last day of one term to apply for re-admission in the next, is not sufficient, although the notice remains up throughout the vacation. *Ex parte Cross*, 18

2. An attorney who has given his notices to apply for re-admission on the last day of one term, cannot apply on those notices for re-admission in the next. *Ex parte Mosley*, 69

ATTORNEY (RESIDENCE OF).

A notice of action given to justices of the peace, under the 24 Geo. 2, c. 44, s. 1, is sufficient, if the attorney gives his place of business as his place

of abode, though he resides at another place. *Roberts v. Williams*, 486

AUDITA QUERELA.

The Court will relieve on motion, instead of putting a party to his *audita querela*, where the case is clear, but not otherwise; and therefore, where a plaintiff, after he recovered damages in an action of slander for words imputing felony, was convicted and attainted of felony, and the defendant in the action was a witness against him, the Court refused to interfere, by staying all further proceedings in the action, though the Crown declined to interfere. *Simons v. Blake*, 263

AWARD.

See AFFIDAVIT—ARBITRATION—ATTACHMENT, 7.

1. An action for trespass for taking goods was referred, principally with the view of determining the right of property in the goods; the defendants contending that the plaintiff had no property in them, but that they belonged to a third person: another complaint in the declaration was, that the defendants had committed an assault upon the plaintiff's wife, *per quod consortium amisit*: and all other matters in difference were also referred. No evidence was given before the arbitrator to prove the *per quod*, but there was only one assault proved to have been committed on the wife; and the plaintiff abandoned his claim to part of the goods. The arbitrator made his award, merely ordering the verdict which had been entered for the plaintiff to stand, and the damages to be reduced to 35*l.*; but made no award respecting the right of property in the goods:—*Held*, that the award was sufficiently final. *Bird v. Cooper*, 148

2. An action having been brought

AWARD.

for the recovery of a sum of money, but which had only proceeded as far as the writ and appearance, and the defendant claiming a larger sum to be due to him, it was agreed that the action and the disputes arising out of the accounts and other matters in difference should be referred, the costs of the action, of the reference, and of the award, to abide the event of the award. The arbitrators awarded that the action should cease, and be no further prosecuted; and that on the balance of all accounts there was a sum of 661*l.* due to the defendant from the plaintiff, which they ordered him to pay on a particular day:—*Held*, that the award was sufficiently final, and decided the event of the action, to prevent the plaintiff setting it aside, though perhaps the Court would refuse an attachment. *Eardley v. Steer*, 423

3. To a declaration on an award, the defendants pleaded, that by an agreement to which they, who were the churchwardens and overseers of a parish, were parties of one part, and the plaintiff and one *E. T.*, farmers in the parish, of the other part, reciting that, in a rate for the relief of the poor, the plaintiff and *E. T.*, conceiving themselves to be over-rated for certain property in proportion to other parishioners, had given notice to the defendants of their intention to appeal; that the defendants intended to defend the same; but that, as both parties had agreed to refer all matters in difference, no appeal had been entered; and that, to determine on the propriety of the rate, so far as regarded the plaintiff and *E. T.*, they had agreed to refer the various matters in difference to three arbitrators: it was witnessed, that the defendants, so far as they lawfully might or could, as churchwardens and overseers, and also the plaintiff and *E. T.*, respectively, agreed to abide by the award

of the arbitrators, who were to award upon those matters in difference, as to the expenses of that agreement, and also as to the costs of the award; the plea then set out the award *verbatim*, which directed the defendants to pay to *T. E. F.*, the attorney of the plaintiff and *E. T.*, 16*l.* 12*s.*, his bill already delivered, and also his further costs of attending the arbitration, &c.; that they should pay to Messrs *A. & L.* 20*l.* 4*s.* for their costs in attending the arbitration, &c.; that they should pay to Messrs. *A. & L.* 57*l.* 19*s.*, for the expenses of the arbitrators; and that the defendants should deduct from all future rates charged upon the plaintiff, 10*s.*, and return him 10*s.* for every rate he had paid while the scheme was in operation: and as to the quantity of a lake occupied by the plaintiff, which was in dispute between them, they ordered the rate to be altered by the parish according to the schedule annexed to the award; and lastly, as to *E. T.*, they ordered the defendant to repay him for every past rate, and to deduct from every future rate, 5*s.*; and the plea concluded thus:—"and the defendants in fact say, that the award is void and bad in law, and this they are ready to verify," &c. On special demurrer to this plea, on the ground that the plea referred to the jury what ought to be decided by the Court:—*Held*, by Lord *Abinger*, and *Bolland*, B., that the plea was good in form, but bad in substance, because the submission and award were void, as the principal matter referred could not legally be referred by the defendants, as parish officers; that the parish were not bound by the decision of the arbitrators, nor the defendants as parishioners, nor any other of the parishioners; that the award being void with respect to the principal matter referred, it was also void as to the costs; and that the award left one of

the principal matters in so much doubt thatt he parties could not have the benefit of it.

Parke, B., held that the plea was good in form and substance, and that the award was divisible; that though the defendants could not be compelled to perform the first part of the award respecting the rate, yet that the award was good, so far as it directed the defendants to pay the costs occasioned by the appeal, &c., and of the award; that the fact of the quantity of the lake occupied by the plaintiff not being settled by the arbitrators, but directed by them to be measured by the parish, was not material; and that the amount of the attorney's costs, which the plaintiff alone was liable to pay, might be fixed by evidence. *Thorp v. Cole*, 457

4. It is no ground for impeaching an award that the arbitrator has been mistaken in point of law as to the admissibility of certain evidence. *Armstrong v. Marshall*, 593

5. A cause and all matters in difference were referred to an arbitrator, the costs to abide the event, as upon a trial at law, and final judgment might be entered up thereon by either party. The arbitrator awarded that the plaintiff had no cause of action, and ordered the defendant to pay a sum of money to the plaintiff; but (he added) it was not intended to prevent the plaintiff from recovering upon an agreement signed by the defendant, but that at present he had no cause of action:—*Held*, that the award was sufficient. *Harding v. Forshaw*, 761

6. Where there is a doubt about the validity of an award, the Court will neither set it aside nor grant an attachment, but leave the party to bring an action: *secus*, when a verdict has been taken. *Burley v. Stevens*, 770

7. The time for making an award

being limited to the 18th of *April*, with power to enlarge the time, but not stating how the arbitrator, at a meeting on the 16th, in the presence and with the consent of all parties, appointed the 29th of *June* for a further meeting:—*Held*, to be a sufficient enlargement of the time. *Ib.*

The 3 & 4 *Will.* 4, c. 42, s. 39, is general as to the power of the Court to enlarge the time for making awards. *Ib.*

BAIL.

See AMENDMENT—ATTACHMENT (SETTING ASIDE), 1, 2.

1. If notice of country bail is given who are to justify pursuant to the old practice, the four days' notice required by 1 *Reg. Gen. T. T.* 1 *Will.* 4, need not be given. *Hardbottle v. Clark*, 12

2. Notice of justification of bail, where further time has been obtained, must be given before 3 o'clock on the day the order is made. *Newton's Bail*, 270

3. "*Ely*, in the county of *Cambridge*," is a sufficient description of a bail's residence in an affidavit of justification. *Hunt's Bail*, 272

4. It is sufficient for bail to swear himself not to be bail for any "defendant" except in the action wherein he becomes bail. *Ib.*

5. If a bail swears to sufficient property "over and above all his just debts," without the words "what will pay," the affidavit is good. *Ib.*

6. After bail are sworn, it is too late to object that the costs of a former unsuccessful attempt to justify are not deposited. *Knight's Bail*, 328

7. After bail had justified, the plaintiff not having excepted to them, in consequence of each of them positively swearing to the requisite amount, the plaintiff discovered that they were both insolvent:—The

BAIL-BOND.

Court refused to compel the defendant to put in other bail. *Lazarus v. Levaux*, 353

8. In the *Exchequer*, bail justifying by affidavit, having being before rejected, must make a deposit for costs. *Turley's Bail*, 498

An affidavit to oppose bail, on the ground that they have been before rejected, must shew that they were rejected for insufficiency. *Ib.*

9. A notice of justification of bail at chambers, not specifying the hour, is a nullity; and though a notice of waiver of the first notice, and a fresh notice of justification specifying the time, were served two hours afterwards, yet being too late:—*Held*, that the plaintiff was justified in not attending to oppose the bail:—*Held*, also, that the plaintiff was entitled to move to set aside the allowance of bail, though a Judge at chambers had decided that the proceedings were regular. *Staines v. Stoneham*, 678

10. Bail may set aside proceedings against them on payment of costs and rendering, without the bail-bond standing as a security, even though the bail become fixed at a time when, by the practice of the Court, no declaration could be delivered. *Ib.*

11. If a defendant in justifying his bail adopts the new practice under *Reg. Gen. T. T.* 1 *Will.* 4, he must conform to it strictly; and therefore an affidavit of sufficiency, though good by the old practice, but defective by the new, is insufficient. *Penson's Bail*, 627

BAILABLE PROCESS.

See UNIFORMITY OF PROCESS ACT.

BAIL-BOND.

See AFFIDAVIT (INTITLING), 3.—BAIL, 10—DECLARING (= BENE ESSE)
—ORDER, 1, 2—RENDER, 3.

1. Where proceedings were taken on a bail-bond before default in the original action, the mode of taking the objection is, by moving to set aside the writ itself, and not the service of it. *Edwards v. Danks*, 357

2. To have the bail-bond stand as a security, it must appear that a trial was lost at the time of moving for the rule. *Stride v. Hill*, 709

BAIL (DISCHARGED).

See BAIL (RELIEF OF).

Bail are discharged, by time being given to their principal without their consent, although they may not have been damnified. *Hannington v. Beare*, 256

BAIL (FIXING).

See BAIL (RIGHTS OF).

If a writ of *ca. sa.* is sued out against the principal in vacation, returnable immediately after the execution thereof, pursuant to the 3 & 4 Will. 4, c. 67, s. 2, with the intention of fixing the bail, and a Judge's order is afterwards obtained in the same vacation for a return of that writ in a certain number of days, under the 15th section of the 2 Will. 4, c. 39, the bail ought either to have notice given them of the order, or else the order, with the writ, should be entered in the public book, four clear days at least before the writ is made returnable by the order: and for want of this, proceedings afterwards taken against the bail were set aside as irregular.

It is recommended by the Court, that when a *ca. sa.* is issued with the intention of fixing the bail, it should be in the old form, returnable in term; and it seems doubtful whether a *ca. sa.* returnable immediately is sufficient for the purpose of fixing bail. *Kemp v. Hyslop*, 637

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BAIL (RELIEF OF).

See AFFIDAVIT (INTITLING), 3.

1. Proceedings against bail to the sheriff are not waived by the plaintiff declaring *de bene esse* in the original action, after the bail have been served with process. *Vernon v. Turley*, 660

2. The drawer of a bill of exchange having been arrested, his brother agreed with the plaintiff that upon the defendant's agreeing to give goods to a certain amount within a month, and a bill of exchange for the remainder, this action, and another against the acceptor, should cease, and the bill be destroyed; but if the agreement was not performed, the plaintiff might proceed. Within the time two bills of exchange for part of the debt were sent to the plaintiff, which he kept and gave credit for, but the goods were not sent; the defendant soon after became bankrupt; the plaintiff then took proceedings against the bail:—*Held*, that the bail were not discharged either by time being given or by the plaintiff's keeping the two bills. *Ib.*

3. Bail knowing of an agreement to give time, must apply for relief immediately on being served with process. *Ib.*

4. Though the defendant is sued jointly with the bail, proceedings in the action may be stayed on the application of the latter only. *Stride v. Hill*, 709

BAIL (RIGHTS OF).

A *ca. sa.* being made returnable before it issued, and having been issued into a wrong county, are irregularities of which the bail may take advantage by motion. *La Porte's Bail*, 639

BANKRUPT.

See AFFIDAVIT (OF DEBT), 2—ATTOR-

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D. P. C.

NEY AND CLIENT, 1—DEMURRER (STRIKING OUT)—PLEA (FRIVOLOUS), 1—PLEAS (SEVERAL), 2—RELEASE.

• BASTARD.

See TESTAMENTARY GUARDIAN.

BILL OF EXCHANGE.

See AFFIDAVIT (OF DEBT), 3, 6, 7—CONDITION—DECLARATION, 1, 5—FEME COVERT—INSOLVENT, 1—JUDGMENT (ARREST OF) 2—PLEA, 2, 5, 7, 11, 13, 15, 20, 21, 25—PLEA (SETTING ASIDE), 2—PLEA (WITHDRAWING)—RULE (SERVICE OF), 1.

1. In an action on a bill of exchange against the acceptor, the defendant pleaded that he did not accept the bill:—*Held*, that it was competent for him under this plea to give in evidence, that since he accepted the bill a material alteration was made in the date, which vitiated the bill. *Cock v Coxwell*, 187

2. In *assumpsit* against the acceptor of a bill of exchange, part payment may be given in evidence under a plea denying the acceptance, in reduction of the damages. *Shirley v. Jacobs*, 136.

BOND.

See JUDGE (JURISDICTION OF), 2—VENIRE AD TRIANDUM.

BOUNDARIES (OF COUNTY).

See SUMMONS, 8.

BREACHES.

See PLEA, 26—VENIRE AD TRIANDUM.

BRITISH CONSUL.

See FINE, 1.

CAPIAS.

See AFFIDAVIT (OF DEBT), 4—DECLARING (DE BENE ESSE)—OUTLAWRY—PAYMENT INTO COURT

CHANCERY.

(PLEA OF) — SHERIFF, 5 — VARIANCE, 1.

1. In a writ of *capias* it is sufficient to describe a defendant as of his late place of residence, though he may be actually residing at the time at some other place. *Hill v. Harvey*, 163

2. If a writ of *capias* be directed to the sheriffs of London, the subsequent insertion of the word sheriff (in the singular) will not vitiate it. *Irving v. Heaton*, 638

3. In a *capias* "of the gaol of Linton Peveril," is a sufficient description of a defendant. *Loveitt v. Hill*, 579

CASE.

See PLEA, 22—SUMMONS, 10.

CAUSE (SHEWING).

See INTERPLEADER, 7.

CAUSE (SHEWN IN THE FIRST INSTANCE).

Cause may be shewn in the first instance in the *Exchequer*. *Quin v. King*, 736

CERTIFICATE (OF FINE).

See FINE, 1, 2.

CERTIFICATE (OF JUDGE).

See COSTS, 10, 11, 13, 14.

CERTIORARI.

Semble, that the 19 Geo. 3, c. 70, s. 4, empowering the removal of judgments from inferior Courts of record, does not apply to judgments obtained by defendants. *Batten v. Squires*, 53

CHAMPERTY.

See ATTORNEY AND CLIENT, 6, 11.

CHANCERY.

See WRIT OF RIGHT, 2.

CHARGING IN CUSTODY.

The proper mode of charging a

CHARGING IN CUSTODY.

defendant, who is a prisoner in custody of the marshal, with an attachment, is by lodging the attachment with the sheriff, who will take the defendant upon the attachment as soon as he is out of the custody of the marshal. *Boucher v. Simms*, 173

CHRISTIAN NAME.

See AFFIDAVIT, 7.

CHURCHWARDEN.

See MANDAMUS—STRIKING OUT COUNTS.

CINQUE-PORTS.

See RENDER, 4.

COGNOVIT.

1. It is not necessary that the attorney who attends on behalf of a prisoner to explain and attest a *cognovit* should make the declaration required by the rule of *H. T. 2 Will. 4*, c. 72, in writing on the *cognovit*. *Robinson v. Brooksbank*, 395

2. It is a sufficient compliance with the rule of *1 Reg. Gen. H. T. 2 Will. 4*, s. 72, if the attorney who is called in by a defendant in custody to witness a *cognovit*, makes the declaration required by the rule *viva voce*. *Wilson v. Price*, 213

3. Where a defendant is in custody upon a *cognovit*, which it is alleged has been satisfied, the Court will refer it to the Master, to see whether there is anything due upon it, but will not order the defendant to be discharged. *Ib.*

4. In the *Exchequer*, where the defendant gives a *cognovit*, the costs may be taxed before judgment is signed; and if, by the terms of the *cognovit*, the plaintiff is at liberty to tax costs and sign judgment, but signs his judgment before the costs are taxed, the judgment is irregular. *Wilson v. Northern*, 212

CONTRACT. 787

COLLUSION.

See EJECTMENT, 4—INTERPLEADER, 2, 11.

COMMISSIONER.

See LACHES, 5—WAIVER, 4.

The Chief Justice's clerk's list of commissioners is conclusive evidence as to whether a particular person is a commissioner of the *English Court of C. P.* pursuant to the *3 & 4 Will. 4*, c. 42, s. 42, for taking affidavits. *Sharpe v. Johnson*, 324

COMMON PLEAS.

See COMMISSIONER.

COMMON PLEAS (JURISDICTION OF).

See WRIT OF RIGHT, 1.

COMMON PLEAS, LANCASTER.

See REMOVAL OF CAUSE, 2.

CONDITION.

A plaintiff taking a bill of exchange in payment of the debt and costs of an action, may, upon the bill being dishonoured, arrest the defendant on a *ca. sa.*, without delivering up the bill. *Kemp v. Gadderer*, 676

CONSENT.

See INTERPLEADER, 10.

CONSIDERATION.

See PLEA, 7, 21—PLEA (SETTING ASIDE), 2—PLEA (WITHDRAWING).

CONSOLIDATION.

See COSTS, 1.

CONSUL.

See FINE, 1.

CONTRACT.

See PLEA, 3.

F F F 2

CONVICTION.

See GAME ACT—OVERSEER.

CORONER.

See EXECUTION, 3.

CORPORATION.

See COURT (HOLDING).

CORPORATOR.

The circumstance of an attorney being a burgess does not entitle him, in an action against the corporation for costs, to inspect the corporate books in order to prove his retainer. *Stevens v. The Mayor of Berwick-upon-Tweed*, 277

COSTS.

See ADMINISTRATOR—AFFIDAVIT, 4, 5—ARREST (WITHOUT PROBABLE CAUSE)—ATTACHMENT, 1—ATTORNEY—AWARD, 2—DEFENDANT'S COSTS—EXECUTOR—INTERPLEADER—IRREGULARITY, 3—JUDGE (JURISDICTION OF), 1—JUDGMENT (BY DEFAULT)—PAUPER, 1, 2—PLEA, 2—WRIT OF TRIAL, 1.

1. In ejectment against twelve defendants, they defended jointly, and entered into a joint consent rule for part of the premises mentioned in the declaration, but not specifying particularly what part. At the assizes two of the defendants were allowed, by order of the Judge, to suffer judgment by default, and the other ten defendants, without the consent rule being altered, defended for certain parts of the property in their respective occupations, and got a verdict. The Court, however, held, that the verdict must be entered generally for the plaintiff, as the defendants did not establish a right to any property in the possession of the twelve, and that the plaintiff was entitled to the general costs of the cause, but

that the ten defendants were entitled to their costs of defence, to be deducted from the plaintiff's costs. *Bishton v. Hughes*, 412

2. Before the issue was made up, the cause was referred; the costs of the cause were to abide the event of the award. The arbitrator found that the plaintiff had sustained damage to a certain amount upon one of the breaches of covenant specified in his particular; and, as to the rest, that he had no cause of action against the defendant:—*Held*, that the defendant was entitled, under rule 7.4 of *H. T. 2 Will. 4*, to the costs of those issues that were found for him, notwithstanding the cause was not in strictness at issue. *Daubuz v. Rickman*, 129

3. Where a special case, on which judgment had been given for the plaintiff in this Court, was at the instance of the defendant turned into a special verdict, that he might have an opportunity of obtaining the judgment of a Court of error thereon, this Court, after the lapse of two years, refused to allow the plaintiffs the costs occasioned thereby. *Coltins v. Gwynne*, 122

4. Where, in an action on the case, a defendant succeeds on one of several issues, which goes to the foundation of the plaintiff's cause of action, he will be entitled to the general costs of the cause, although there is a verdict for the plaintiff upon the plea of "not guilty" without damages. *Frankum v. Lord Falmouth*, 65

5. Where a jury is discharged by the Judge, of his own authority, from finding a verdict, they being unable to agree, the ultimately successful party is not entitled to the costs of the first attempt at trial. *Waite v. Spurgin*, 575

6. The rule of 1796, concerning costs on rules discharged without any direction as to costs, is strictly con-

fined to applications on the ground of irregularity, either mentioned in the rule or in the affidavits. In all other cases where rules are moved with costs, and discharged generally without saying anything about costs, the successful party will not be entitled to them. A special direction must be given by the Court in order to enable him to obtain them. *Drinker v. Pascoe*, 566

7. Where the declaration in ejectment, containing only one count and one demise, claimed several messuages, and the jury found a verdict of *guilty* as to some, and *not guilty* as to another, the Court held, that, pursuant to 1 *Reg. Gen. Hilary Term*, 2 *Will.* 4, s. 74, the defendant was entitled to his costs as to the messuage with respect to which the plaintiff had failed, and to have them set-off against those of the lessor of the plaintiff. *Doe d. Errington v. Errington*, 602

8. The costs of a cause were allowed to be set off against a sum due from the defendant to the plaintiff on another account, but subject to the lien of the plaintiff's attorney: the cause and all matters in difference having been referred, and the arbitrator having ordered a verdict to be entered for the defendant, but found that the defendant was indebted to the plaintiff on other accounts. *Caddell v. Smart*, 760

9. Where a country attorney, a defendant in a cause, not being an attorney of this Court, defended in the name of a *London* agent, who was an attorney of this Court, and the defendant attended the assizes in person, and the plaintiff was nonsuited: —*Held*, that the defendant was entitled to his fees for attending the trial, drawing briefs, &c., as all the business must be considered to have been done in the name of the *London* agent. *Jervis v. Dumes*, 764

10. Under the plea of not guilty in trespass *quare clausum fregit*, the plaintiff is entitled to full costs, though the damages recovered are less than 40s., and there is no certificate of the Judge, under the 22 & 23 *Car. 2*, c. 9. *Hughes v. Hughes*, 532

11. Where a Judge certified at the trial of an action of trespass, to deprive the plaintiff of costs, the Court held the Judge's opinion final. *Twigg v. Potts*, 266

12. Where there are several issues, some of which are abandoned at the trial, the plaintiff is entitled only to the costs of those parts of the briefs, and such of the witnesses as were necessary for the issue on which he succeeded. *Gougenheim v. Lane*, 482

13. The 43 *Eliz. c. 6*, s. 2, only empowers the Judge who tries the cause to give the certificate, under that act, to deprive the plaintiff of costs. And in case of executing a writ of inquiry, whether before a Judge or a sheriff, the certificate cannot be granted. *Claridge v. Smith*, 583

14. In an action *qu. cl. fr.*, the plaintiff obtaining less than 40s. damages, the plea of not guilty, since the new rules of pleading, being a special plea, takes the case out of the 22 & 23 *Car. 2*, c. 9, s. 136; but the Judge may, notwithstanding, grant his certificate under the 43 *Eliz. c. 6*, s. 2, to deprive the plaintiff of costs, the whole record and evidence at the trial being properly taken into consideration. *Smith v. Edwards*, 621

COSTS (DOUBLE).

The defendant will not be allowed to enter a suggestion on record to entitle him to double costs, if the plaintiff is willing to give him double costs without. *Fosbrooke v. Holt*, 700

COSTS (IN THE CAUSE).

See PEREMPTORY UNDERTAKING, 1.

1. The costs of executing a commission in a foreign country, under 1 Will. 4, c. 22, s. 4, are costs in the cause, unless some special ground is laid for ordering otherwise. *Prince v. Samo*, 5

2. The costs of shewing cause against a rule for setting aside an award are costs in the cause, and the party who ultimately has the verdict in his favour is entitled to have them taxed to him, notwithstanding the other party succeeds in part of his application. *Goodall v. Ray*, 1

3. Before bail above are perfected, or until the time for excepting to them has passed, the defendant is entitled as a matter of right to pay in the debt, with a sum for costs, under the 7 & 8 Geo. 4, c. 71, s. 2; and therefore, though he does not pay in the money until after he has put in though not justified bail above, and the plaintiff has been put to expense by searching for them, and making inquiries, the defendant is not liable to pay those expenses, but they are properly costs in the cause. *Stanforth v. M'Cann*, 367

COSTS (OF THE CAUSE).

See Costs, 1, 4, 8.

COSTS (OF THE DAY).

In order to ground an application for costs of the day, upon a rule for judgment as in case of a nonsuit being discharged on a peremptory undertaking, it is necessary that it should appear by affidavit that costs have been incurred. *Ray v. Sharp*, 354

COSTS (SECURITY FOR).

See HUSBAND AND WIFE.

1. The Court will not compel a

plaintiff to give security for costs already incurred. *Oxenden v. Cropper*, 574

2. During the pendency of a rule for a new trial obtained by the plaintiff, the Court will not compel a plaintiff to give security for the future costs in the cause. *Ib.*

3. The absence of a plaintiff abroad, unless it is shewn to be of a permanent character, is not a ground for compelling him to give security for costs. *Frodsham v. Myers*, 280

4. After an arrest of a defendant, the plaintiff removed his furniture, and absconded, to avoid a charge of bigamy:—*Held*, that the defendant was entitled to security for costs. *Rogers v. Banger*, 411

5. A motion for security for costs must be made as soon as possible after the fact of the plaintiff having gone abroad is known to the defendant. *Wainwright v. Bland*, 547

COUNTS (SEVERAL).

1. A count for double rent, and also for the single value of the same premises, may be joined in the same declaration. *Thornton v. Whitehead*, 747

2. In an action for tolls on coals brought into a port claimed to be due to the plaintiff by prescription or grant from the Crown:—*Held*, that he could not have two counts in the declaration, one claiming the tolls as port duties, and the other as metage fees, and that one of the counts must be struck out, and with costs, unless a Judge should be satisfied that a distinct subject-matter of complaint was intended to be established upon each count, and the usual undertaking given to adduce material evidence on both counts. *Jenkins v. Treloar*, 690

COUNTS (SEVERING).

See Costs, 7—ISSUES (DIVISIBLE).

COUNTS (STRIKING OUT).

COUNTS (STRIKING OUT).

Applications to strike out counts ought to be made to a Judge at chambers, in the first instance. *Ward v. Graystock*, 717

COUNTY COURT.

See *SHERIFF*, 4.

COUNTY GAOL.

See *RENDER*, 4.

COURT (HOLDING).

Where a charter is granted to a corporation to hold a Court for the trial of causes, the disuse of that Court for two hundred years, and the want of funds to hold it, are no answer to a rule for a *mandamus* commanding them to hold it. *Rex v. Wells*, 572

COURT OF REQUESTS.

See *ATTORNEY (PRIVILEGE OF)*, 1, 2—*WRIT OF TRIAL*, 2.

1. An unfounded objection to a voter's name in the list, pursuant to the 2 *Will.* 4, c. 45, s. 47, by which he is prejudiced, having to attend the revising barrister, does not give such a legal or equitable claim for compensation for loss of time, &c., as will enable him to sue under the *Westminster* Court of Requests Act; and therefore, if the Commissioners under it proceed on the claim, they may be restrained by prohibition. *Soames v. Rawlings*, 501

2. The defendant is now at liberty to move to have a suggestion entered under the Court of Requests Act, to deprive the plaintiff of costs, notwithstanding final judgment may have been signed, if the motion is made as early as can be, and particularly if it appears that the costs have not been taxed. *Godson v. Lloyd*, 157

3. Where it appears upon the record that the debt sought to be re-

DATE (OF BILL). 791

covered is under 40*s.*, and that the defendant resides within the operation of a Court of Requests Act, which gives costs to a defendant if the plaintiff proceeds in a superior Court and recovers less than 40*s.*, a suggestion is unnecessary. *Defries v. Snell*, 680

4. The 4th of *Geo.* 4, c. cxxiii., repeals the previous *Southwark* Court of Requests Acts, as to depriving a plaintiff of costs where he recovers less than 40*s.* *Claridge v. Smith*, 583

COVENANT.

See *DECLARATION*, 2—*PLEA*, 26—*VARIANCE*, 3.

CREDIT (FOR SUMS RECEIVED).

1. The Court will not compel a plaintiff to give credit in his particulars for sums received. *Penprase v. Crease*, 711

2. In an action on an attorney's bill, containing several items, some of which the defendant admitted, but disputed others, on the ground that he had derived no benefit from the work done, the Court refused to allow part of the bills to be referred to the Master, and that the defendant might pay into Court such part as he admitted to be due, on the ground that if the defendant had derived no benefit, it would be an answer to the action on the general issue. The Court also refused to order the plaintiff to give credit for sums received. *Randall v. Ikey*, 692

CROSS-DEMAND.

See *PROMISSORY NOTE*.

DAMAGES.

See *BILL (OF EXCHANGE)*, 2—*PAUPER*, 2—*PLEA*, 17—*SMALL DEBTOR*, 1.

DATE (OF BILL).

See *AFFIDAVIT (OF DEBT)*, 7.

DAY RULE.

See SMALL DEBTOR, 5.

DEATH (OF PLAINTIFF).

See JUDGMENT (ARREST OF), 1.

DEBET AND DETINET.

See DECLARATION.

DEBT.

See VENIRE AD TRIANDUM.

DECLARATION.

1. A demurrer to a count on a bill of exchange, (which was in the exact form given by the rules of *Trinity Term*, 1 *Will.* 4), that the words "now elapsed" did not shew that the bill was due before the action was commenced:—*Held*, not to be "frivolous." *Abbott v. Arlett*, 759

2. In covenant to allow a business to be carried on in a certain shop, a breach that defendant *improperly* shut up the shop is sufficient, without alleging that the shop was shut up at unreasonable or improper times. *Hodges v. Gray*, 733

3. A declaration in case for words, "that the plaintiff had set fire to his own barley-stack," averred that the stack was insured, and was burnt without his own default, and that the defendant spoke the words of and concerning the plaintiff and the fire:—*Held*, bad on demurrer. *West v. Smith*, 703

4. A count for goods sold, not stating any time when the goods were sold, is sufficient even on special demurrer. *Lane v. Thelwell*, 705

5. In an action by the indorsee against the acceptor of a bill of exchange, the declaration alleged that one *P. N.* drew the bill, and required the defendant to pay to *his* order, &c., and that the defendant accepted the bill, and *P. N.* indorsed it to the plaintiff. On special demurrer, alleg-

DECLARATION.

ing that "his" was ambiguous, &c.:—*Held*, that "his" need not necessarily be referred to the last antecedent; and that it sufficiently appeared that it had reference to the drawer; and the count was therefore sufficient.

A second count alleged that the defendant, on a particular day, was indebted to the plaintiff in 300*l.*, "for money found to be due on an account stated between them:"—*Held*, bad on special demurrer, for not stating when the account was stated.

The defendant demurred to the *declaration*, and then stated the causes of demurrer to each count:—*Held*, that as the demurrer was to the whole declaration, it was too large, because one count was good; and that the plaintiff was therefore entitled to judgment on the whole declaration, though one count was bad on special demurrer. *Spyer v. Thelwell*, 509

6. In debt, by assignees of an insolvent debtor, the declaration in its commencement stated that the plaintiffs, *assignees* of *J. W. B.*, an insolvent debtor, &c., complain of *W. M.*, who has been summoned to answer the plaintiffs, *assignees as aforesaid*, in an action of debt; and they demand of the said *W. M.* 40*l.*, which *he owes to* and unjustly detains from them, &c. The defendant demurred, specially alleging for cause that the plaintiffs did not shew whether they were suing *as assignees* or *as individuals*, and that they ought not to have declared in the *debet* and *detinet*. In making up the demurrer books for the Judges, the plaintiff's attorney had adopted the form of issue directed by the rules of *Hilary Term*, 4 *Will.* 4, and therefore the objectionable part did not appear:—*Held*, *first*, that the issue was properly made up, and therefore the defendant was precluded from taking the objection; and, *secondly*, that the objectionable part, being a mere reci-

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tal of the writ, might be rejected as surplusage.

The declaration alleged that the defendant, &c., was indebted to said *J. W. B.* before he subscribed his petition for his discharge from imprisonment, and executed the conveyance and assignment of his estate and effects according to the provisions of the said acts, in the sum of 20*l.* for goods sold and delivered by the said *J. W. B.* before he became insolvent, to the said defendant at his request, and in 20*l.* for money found to be due from the defendant to the said *J. W. B.* on an account stated between them, which said several monies were to be paid respectively by the defendant to *J. W. B.* before he became insolvent, on request; whereby, &c., an action hath accrued to the plaintiffs, as assignees, &c., to demand and have the said several monies respectively, &c. A special demurrer assigned for cause that no certain time was alleged when the goods were sold, nor when the account was stated:—*Held*, that the former objection could not be sustained, but that the latter was a good objection; but as the demurrer was to the declaration, which was sufficient as to one of the causes of action, though not as to the other, the demurrer was too large, and that the plaintiff was entitled to judgment generally on the whole declaration. *Fergusson v. Mitchell*, 513

7. A declaration by an administratrix, containing a profert of letters of administration, but not alleging positively that they were granted to her, nor by whom they were granted:—*Held* bad upon special demurrer. *Hughes v. Williams*, 169

DECLARATION (DEMAND OF).

See DEPOSIT (IN LIEU OF BAIL), 3.

DECLARING, &c. 793

DECLARATION (INTITLING).

It is irregular to intitle a declaration of the Court on the back of it only. *Ripling v. Watts*, 290

DECLARATION (NOTICE OF).

1. A notice of declaration being filed, served in the country at 150 miles' distance on the day the declaration is stated to be filed, is regular. *Rooke v. Sherwood*, 363

2. A motion to set aside a judgment as irregular for being signed too early on the 13th, notice of declaration not having been given till the 5th, was held to be answered by an affidavit that the notice was served on the 4th; though it was not shewn whether the notice was served on that day before or after declaration filed. *Ib.*

DECLARATION (STICKING UP).

See DISTINGAS, 1.

DECLARATION (WITHDRAWING).

After a summons had been taken out for setting aside an irregular declaration, and both parties having attended before the Judge, who referred them to the Court:—*Held*, that the plaintiff could not withdraw the declaration without paying costs. *Bellotti v. Barella*, 719

DECLARING (AGAINST ONE OF TWO DEFENDANTS).

See VARIANCE, 1.

1. Upon an affidavit of debt against two, a declaration against one is irregular. *Bellotti v. Barella*, 719

2. Upon bailable process against two, a declaration against one is irregular. *Woodcock v. Kilby*, 730

DECLARING (DE BENE ESSE).

See BAIL, 10—BAIL (RELIEF OF), 1.

794 DECLARING, &c.

The plaintiff in a bailable action is now at liberty to declare *de bene esse* immediately after the expiration of the eight days, and at any time before bail above are perfected, whether they have been put in or not; and if the plaintiff has not declared *de bene esse*, proceedings on the bail-bond may be stayed on payment of costs and perfecting bail, without the bail-bond standing as a security. *Baisley v. Nembold*, 177

DECLARING (TIME FOR.)

If the defendant appears after service of a writ of summons before the eight days are expired, the plaintiff may immediately after declare against him, without waiting till the eight days are expired. *Morris v. Smith*, 198

DEFENDANT'S COSTS.

See JUDGE (JURISDICTION OF), 1.

Where there are several defendants in trespass, and some are acquitted and others convicted, those who are acquitted are entitled to increased costs, and not merely to forty shillings. *Griffith v. Jones*, 159

DE INJURIA.

See PLEA, 14—REPLICATION, 1, 2, 3.

DEMURRER.

See DECLARATION, 1, 5.

Where a defendant, on the last day for joining in demurrer, obtained a rule *nisi* for setting aside the plaintiff's proceedings, with a stay of proceedings in the mean time, which rule was afterwards discharged, with costs:—*Held*, that the defendant was in time to join in demurrer at any time in the day that the rule was disposed of, and that a judgment previously signed by the plaintiff was irregular. *Vernon v. Hodgins*, 665

DEPOSIT (IN LIEU OF BAIL).

DEMURRER BOOK.

See DECLARATION, 6.

DEMURRER (FRIVOLOUS).

See DECLARATION, 1.

DEMURRER (STRIKING OUT).

The Court refused to allow a plaintiff to strike a demurrer out of the paper, on the ground of the bankruptcy of the defendant. *Flight v. Glossop*, 135

DEPONENT (RESIDENCE OF).

1. It is sufficient compliance with 1 *R. G. H. T. Will.* 2 4, s. 5, as to a deponent's residence, to describe himself as having been arrested, and to be a prisoner in the sheriff's custody. *Jervis v. Jones*, 610

2. A prisoner defendant need not comply with 1 *Reg. Gen. H. T.* 2 *Will.* 4, s. 5, by stating his residence in an affidavit. *Sharpe v. Johnson*, 324

3. The residence of an attorney's clerk need not be given in an affidavit made by him jointly with his master, in which the residence of the latter is stated. *Bottomley v. Belchamber*, 26

DEPOSIT (IN LIEU OF BAIL).

See COSTS (IN THE CAUSE), 3—SHERIFF, 1.

1. Where the action has been commenced in an inferior Court without process against the person, and afterwards removed, *semble*, that the defendant cannot pay money into Court in lieu of special bail. *Morgan v. Pedler*, 646

2. The rule for taking money, deposited in lieu of bail, out of Court, in consequence of the plaintiff's becoming nonsuit, is *nisi* in the first instance. *Grant v. Willis*, 581

3. A defendant, who deposits money with the sheriff in lieu of bail, is not in Court, so as to demand a de-

claration, until the money is actually paid into Court, though the sheriff has returned that he has paid in the money, and the plaintiff has consented to the defendant's entering a common appearance and paying into Court the additional 10*l.*, under the 7 & 8 Geo. 4, c. 71, s. 1. *Hall v. Champneys, Bart.*, 713

4. Money deposited by a third person, in lieu of special bail, cannot be got back by application to the Court, on the defendant's rendering; it must remain in Court to abide the event. *Bull v. Turner*, 734

5. A plaintiff is not entitled to receive out of Court, money paid in by a defendant in lieu of bail under the 7 & 8 Geo. 4, c. 71, s. 2, unless judgment has been obtained, or the suit otherwise legally determined. *Johnson v. Wall*, 315

DESCRIPTION.

See AFFIDAVIT (INTITLING), 1, 2—BAIL, 3—CAPIAS, 2, 3—SUMMONS, 2.

DETAINDER.

See LACHES, 4.

A plaintiff cannot lodge a detainer against a defendant, and then, having, on the ground of a defect in the writ, treated it as a nullity, lodge a second detainer against him. *Gadderer v. Sheppard*, 577

DISCRETION (OF COURT).

See IRREGULARITY, 3.

DISTRESS.

See PLEA (INCONSISTENT).

DISTRIBUTIVELY (PLEA TAKEN).

See PLEA, 9.

DISTRINGAS.

1. On the sheriff's return of *non est inventus* and *nulla bona* to a writ

of *distringas*, if it appears that the defendant keeps out of the way to avoid his creditors, the Court will allow an appearance to be entered for him; but will not on the same motion give leave to stick up notice of declaration in the office. *Copeland v. Nevill*, 51

2. After a *distringas* has been executed, and the sheriff has made his return that he has levied 40*s.*, an appearance may be entered by the plaintiff for the defendant without an affidavit. *Page v. Hemp*, 203

3. Where it is clear that the defendant keeps out of the way to avoid being served, the Court will grant a *distringas*, although three calls and two appointments have not been made. *Hickman v. Dallimore*, 278

4. In order to obtain a *distringas*, it is necessary that all the calls should be made on different days. *Cross v. Wilkins*, 279

5. Where leave to issue a *distringas* has been obtained against the defendant for not entering an appearance, upon which the sheriff has returned that he has levied 40*s.*, no rule is necessary previously to entering a common appearance. *Tucker v. Brand*, 411

6. In order to obtain a *distringas* for non-appearance, it must be shewn that the defendant is absent, or circumstances must be stated from which it can be inferred by the Court that the defendant is avoiding the process of the Court. *Houghton v. Howarth*, 749

DOUBLE RENT.

See COUNTS (SEVERAL), 1.

DOVER CASTLE.

See RENDER, 4.

DRAWER.

See AFFIDAVIT (OF DEBT), 3, 6—DECLARATION, 5—FEME COVERTE—PLEA, 2, 5, 11, 13, 20, 21.

DUTY.

See EXTENT.

EJECTMENT.

See COSTS, 1, 7—JUDGMENT (BY DEFAULT).

1. An affidavit of service on *W. D.* tenant in possession, by affixing the declaration on the door, no person being therein:—*Held*, to be insufficient for judgment against the casual ejector. *Doe v. Roe*, 173

2. If one term is allowed to elapse in a town cause between the service of the declaration in ejectment and the motion for judgment against the casual ejector, the notice to appear being in the former term, a rule *nisi* only for judgment will be allowed in the *C. P.* *Doe d. Wilson v. Roe*, 124

3. In the absence of a suggestion of collusion between the lessor of the plaintiff and the tenant, the Court will not set aside a regular judgment in ejectment after execution, in order to let in the landlord to defend. *Doe d. Thomson v. Roe*, 115

4. The practice of allowing judgment to be signed against the casual ejector, where the term in which the appearance is required, and before which the service has been effected, has elapsed, in the following term, only applies to country causes. *Doe d. Greaves v. Roe*, 88

5. Special service in ejectment. *Doe d. Grimes v. Roe*, 86

6. Service on the administratrix of the last tenant in possession is not sufficient, unless it is shewn that she is the tenant in possession. *Doe d. Rigby v. Roe*, 14

7. Service of the declaration in ejectment upon the tenant's daughter before the term, and an acknowledgment by the tenant within the term:—*Held* sufficient to ground a motion for judgment against the casual ejector. *Doe d. Smith v. Roe*, 265

EJECTMENT.

8. Service on an agent on the premises, the tenant being abroad, is sufficient to entitle the lessor of the plaintiff to a rule *nisi* against the casual ejector. *Doe d. Treat v. Roe*, 278

9. A declaration in ejectment intitled by mistake of *Trinity Term*, 6 *Will.* 4, instead of 5 *Will.* 4, but dated *Aug.* 1, 1835, was held sufficient to warrant a rule for judgment against the casual ejector. *Doe d. Smithers v. Ro* 374

10. Where a declaration in ejectment was served on the son of the tenant in possession, upon an affidavit that the father was in the house at the time, the Court refused to interfere, on counter affidavits that he was not at home, but was absent on business, and not to avoid service, the affidavits not negating that the son gave the declaration to the father before the first day of term. *Doe d. Protheroe v. Roe*, 385

11. The Court granted a rule *nisi* for judgment against the casual ejector, on an affidavit merely stating that the tenant "appeared to be acquainted with the intent of the declaration," without stating that it had been either read or explained to him. *Doe d. Downes v. Roe*, 565

12. An affidavit of service of a declaration in ejectment upon the person in possession is insufficient. *Doe d. Oldham v. Roe*, 714

13. In ejectment for a mine and land in *Cornwall*, the defendant cannot defend for a right of entry to dig for mines, and take the mineral known there by the name of "tin-bounds." *Doe d. Earl Falmouth v. Alderson*, 701

14. In order to entitle a tenant in possession in an action of ejectment to enter into the consent rule, without confessing ouster, it is not sufficient to shew that he holds under a tenant in common. *Doe d. Wills v. Roe*, 628

EJECTMENT.

15. The affidavit in support of an application for judgment against the casual ejector must swear to a service on the "tenant in possession," the word "occupier" not being sufficient. *Doe d. Jackson v. Roe*, 609
16. Service in ejectment. *Doe d. Grimes v. Roe*, 591
17. Service in ejectment. *Doe d. Jordan v. Roe*, 577

ELECTION.

See AFFIDAVIT, 5.

ERROR.

See JUDGMENT (ARREST OF), 1—
PLEA, 7.

In error, where the transcript has been removed, the Court below has no jurisdiction to allow judgment of *nonpros* to be signed on account of its not having been prepared in due time, although no *laches* existed on the part of the defendant in error in endeavouring to sign such judgment. *Pitt v. Williams*, 70

ESTOPPEL.

See PLEA, 29.

EXCHEQUER.

See CAUSE (SHEWN IN THE FIRST INSTANCE).

Semble, that the Court of *Exchequer* has power to refer it to the Master to take an account of the rents and profits of land extended to the plaintiff, and to order him to refund the overplus, if it shall appear that he has been overpaid. *Brookbank v. Miers*, 179

EXECUTION.

1. A defendant taken in execution cannot avail himself of the plaintiff not carrying in the judgment-roll so as to obtain his discharge. *Deemer v. Brooker*, 9

2. A writ of *ca. sa.* directed to the coroner, on the ground of the sheriff

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being interested, need not recite that fact, nor need any suggestion to that effect be entered on record previous to suing out such a writ. *Barston v. Trutch*, 6

3. The defendant is sufficiently charged in execution if in custody at the time, at the suit of another person, by the writ indorsed by the coroner being lodged with the county gaoler at the gaol. *Ib.*

EXECUTION (CHARGING IN).

See EXECUTION.

1. A writ to charge a defendant in execution was delivered to the under-sheriff's deputy in *London* within the second term: but was not delivered to the gaoler in the country till after the term:—*Held*, that the defendant was regularly charged in execution. *Williams v. Waring*, 200

2. Where a defendant was charged in execution upon a writ indorsed to satisfy 188*l.* 9*s.*, and interest of 156*l.* until paid:—*Held*, that that was not such a misindorsement as to entitle the defendant to his discharge, but that the proper course was for the defendant to have moved to have the indorsement set right. *Ib.*

EXECUTOR.

1. The decision of a Judge at chambers under the 3 & 4 *Will.* 4, c. 42, s. 31, as to executor's costs, is not final, but may be reviewed by the full Court. *Lakin v. Massie*, 239

2. The Court will not exempt executors, plaintiffs, from payment of costs, unless it appears that they have made due inquiries and exercised a proper caution before bringing the action. *Engler v. Twisden*, 330

3. On a plea of *plene administravit præter*, where the plaintiff elects to take judgment of assets *quando acciderint*, he is entitled to judgment both for debt and costs. *Cox v. Peacock*, 134

EXTENT.

See EXCHEQUER.

An extent having issued against the defendant, certain freehold property was seized and sold under the 25 *Geo.* 3, c. 35. The purchaser having paid the purchase-money into the bank, afterwards, and before any conveyance was executed, sold the property to another person for a less sum, and, in order to avoid the necessity of paying the *ad valorem* duty on two conveyances, applied to the Court that the sub-purchaser's name might be substituted in the conveyance for that of the original purchaser. The Court declined to grant the application, unless with the consent of all parties; which was afterwards obtained, and an order made. *Rex v. Rawlings*, 407

FAVOUR.

See WAIVER, 2.

FEE (ON ARREST).

See ARREST, 2.

FEME COVERTE.

A married woman who has put her name to a bill of exchange, as drawer, and is arrested upon it, will not be discharged on motion. *Welsh v. Gibbs*, 683

FINE.

1. The affidavit of the certificate of the acknowledgment of a fine may be sworn before a *British* consul. *In the Matter of the Trustees of Mrs. Barber*, 640

2. The affidavit verifying the certificate of the acknowledgment of a fine must be sworn before a Judge or commissioner of the *Common Pleas* in *England*: therefore, where the affidavit was sworn before a commissioner of the *Common Pleas* in *Ireland*, the Court refused to receive the

acknowledgment. *Rogers v. Fry*, 641

FOREIGN ATTACHMENT.

See TROVER.

FOREIGN WITNESS.

See COSTS (IN THE CAUSE), 1—PLEA (AMENDMENT OF)—WITNESS (EXAMINING BEFORE COMMISSIONERS).

Upon an application for the issuing of a commission to examine witnesses abroad, the names of the witnesses ought to be given in the affidavits, or at least some certain description of them. *Gunter v. M'Kear*, 722

FRAUD.

See PLEA, 11.

FRIVOLOUS DEMURRER.

See DECLARATION, 1.

GAME ACT.

A conviction under the 1 & 2 *Will.* 4, c. 32, s. 30, is still irremovable under sect. 45, notwithstanding the 5 & 6 *Will.* 4, c. 20, s. 21. *Rex v. Hester*, 589

GAOL.

See ARREST, 3.

GENERAL ISSUE.

See ATTORNEY (BILL OF), 1—REPLICATION, 1.

GOODS SOLD.

See DECLARATION, 4, 6.

GOODS SOLD AND DELIVERED.

See PLEA 3.

GREAT SESSIONS.

See SCIRE FACIAS, 1.

HABEAS CORPUS.

See TESTAMENTARY GUARDIAN.

HABEAS CORPUS AD TESTIFICANDUM.

The rule for bringing up a defendant from criminal custody on a *habeas corpus ad test.* is nisi only in the first instance. *Rex v. Pilgrim*, 89

HUSBAND AND WIFE.

PLEA, 28.

Where an action is brought (without the authority of the husband) in the name of husband and wife, for an assault upon the latter, the husband will be entitled to stay the proceedings until he receives an indemnity against the costs. *Harrison v. Almond*, 321

INDORSEE.

See AFFIDAVIT (OF DEBT), 6—DECLARATION, 5—PLEA, 5, 7, 11, 13, 15, 20, 21—PROMISSORY NOTE.

INDORSEMENT (ON PROCESS).

See EXECUTION (CHARGING IN), 2—STAYING PROCEEDINGS, 4—SUMMONS, 5—WRIT OF TRIAL, 3.

1. A writ indorsed with the name of the firm of the attorney used in carrying on the business, satisfies the 12th section of the 2 Will. 4, c. 39, though only one of them is alive and an attorney. *Hartley v. Rodenkurst*, 748

2. The Court will not discharge a defendant out of custody on a *testatum ca. sa.*, on the ground of the want of an indorsement on the *ca. sa.*, pursuant to the rule of *Hilary*, 2 & 3 Geo. 4. *Davidson v. Dunne*, 119

INDORSER.

See AFFIDAVIT (OF DEBT), 3, 6—DECLARATION, 5—PLEA, 2, 7, 11, 13, 15, 20, 21.

INFANT.

1. To entitle a defendant to relief

from a judgment signed on a warrant of attorney, given by him for the price of goods supplied by the plaintiff, on the ground of infancy, the defendant at the time keeping a shop, and acting as if he were of age, he ought to make out a clear case: merely swearing that he is an infant of the age of twenty years, and giving an extract from a register of births, is not sufficient for the Court to act upon. *Weaver v. Stokes*, 724

2. An appearance entered by a plaintiff for an infant defendant by an attorney, is irregular, and the subsequent proceedings may be set aside without costs, even after a writ of inquiry executed. *Nunn v. Curtis*, 729

3. A motion on behalf of an infant defendant to set aside irregular proceedings, may be made by his father or an attorney, but it must appear to be made with the consent of the defendant. 16.

INFERIOR COURT.

See CERTIORARI—DEPOSIT (IN LIEU OF BAIL), 1.

INQUIRY (WRIT OF).

See COSTS, 13—LACHES, 1.

INSOLVENT.

See ATTORNEY (BILL OF), 2—ATTORNEY AND CLIENT, 13—DECLARATION, 6.—JUDGMENT AS IN CASE OF A NONSUIT, 5.

1. If a bill of exchange is given by an insolvent after his discharge, for a debt included in his schedule, and in pursuance of an agreement made before his discharge, for withdrawing an intended opposition, the defendant cannot be held to bail upon it. *Gould v. Williams*, 91

2. If a defendant taking the benefit of the Insolvent Act, the 7 Geo. 4, c. 57, inserts in his schedule the purchase-money of an annuity, as well

as the annual amount of the latter, he will be discharged as to the arrears of that annuity due at the time of making out the schedule, although they have been omitted, if such omission did not arise from an intention to mislead. *Jervis v. Jones*, 610

INSPECTION.

See PLEA (WITHDRAWING).

INSPECTION (OF BOOKS).

Certain books of the plaintiff had come into the defendant's possession as his agent. It became necessary for the plaintiff to inspect them. The Court ordered the defendant to allow an inspection, but would not order him to deliver them up. *Jones v. Palmer*, 446

INTEREST.

See AFFIDAVIT (OF DEBT), 1, 2.

Upon a summons to refer an attorney's bill for taxation, if he intends to insist upon interest under the 3 & 4 Will. 4, c. 42, s. 28, he ought to have it made part of the order that the Master shall allow interest. *Berrington v. Phillips*, 758

INTERPLEADER.

1. Where the sheriff's rule under the Interpleader Act does not pray costs, and the claimant does not appear, the Court will not, on disposing of the rule, at once order the claimant to pay costs, but will make an order conditional on his not appearing within a certain period. *Shuttlenorth v. Clark*, 561

2. A sheriff or other officer, applying to the Court under the 6th section of the Interpleader Act, need not deny collusion. *Bond v. Woodhall*, 351

3. Where a claimant, after an application under the Interpleader Act, abandons his claim after an issue directed, the sheriff is entitled to his costs from the time of directing the issue, and of the application of those costs. *Scales v. Sargeson*, 231

INTERPLEADER.

4. A contested claim to a reward advertised for the apprehension of a felon cannot be made the subject of a motion under the Interpleader Act. *Grant v. Fry*, 135

5. The Court has no power to order rules made under the Interpleader Act to be entered up other than as pointed out in the 7th section, viz. according to their true date. *Lambirth v. Barrington*, 126

6. The sheriff will be allowed his costs of keeping possession after applying to the Court, where it is for the benefit of the parties, and not in furtherance of his duty. *Underden v. Burgess*, 104

7. A motion by the sheriff under the Interpleader Act must be made in Court; but cause may be shewn at chambers. *Beames v. Cross*, 122

8. Where a sheriff, after levying the amount of an execution on the defendant's goods, paid over the proceeds to the execution-creditor, not having received any notice of a claim from any one, and afterwards an action was brought against the sheriff by the defendant's assignees to recover the value of the goods:—*Held*, that the sheriff was not entitled to relief under the Interpleader Act. *Scott v. Lewis*, 259

9. Where a new claim is raised, after a rule *nisi* under the Interpleader Act has been obtained, the sheriff may make the new claimant a party to the rule. *Kirk v. Clark*, 363

10. The Court will not, under the Interpleader Act, allow the sheriff his costs incurred by keeping possession, in consequence of a party refusing to consent to a Judge at chambers making an order in the case; no authority for that purpose being given by the 1 & 2 Will. 4, c. 58, s. 6. *Clark v. Chetwode*, 635

11. If the under-sheriff is the execution-creditor, or partner in business of the execution-creditor, the sheriff is not entitled to relief under the Interpleader Act. *Ostler v. Bower*, 605

12. Where money, the proceeds of an execution, has been paid into Court by the sheriff, under the Interpleader Act, and the claimant abandons his claim, the rule for paying the money out of Court to the execution-creditor, together with his costs, is *nisi* in the first instance. *Stanley v. Perry*, 599

13. Where a claim is made by a person, as partner of the defendant, on property seized by the sheriff, the Court will not grant that officer relief under the Interpleader Act, but will compel the plaintiff to indemnify the sheriff, if he denies the partnership. *Holmes v. Mentae*, 300

IRREGULARITY.

See COSTS, 6.

1. If a copy of a writ is served in vacation, objection to it for irregularity must be taken in vacation, if there is time for that purpose. *Hinton v. Stevens*, 283

2. An objection to a notice of declaration on the ground of variance from the writ, must be taken within four days from the time of serving the notice, whether in term or vacation. An intermediate *Sunday*-counts as one of those days. Some of the days falling within term, and some in vacation, is immaterial. *Ib.*

3. Where a rule is discharged on a preliminary objection to the title of the affidavit supporting the rule obtained for setting aside proceedings on the ground of irregularity, the Court has discretion as to the costs of the application. *Harris v. Mathews*, 608

ISSUE.

See DECLARATION, 6.

ISSUES (DIVISIBLE).

See PLEA.

1. To trespass in three closes, *A.*, *B.* and *C.*, the defendant pleaded—*first*, soil and freehold in *L.*; and, VOL. IV.

secondly, that the closes were parcel of a manor of which *L.* was lord, and that the closes had been wrongfully inclosed. The plaintiff replied to the first plea a seisin in fee in other persons, who let to the plaintiff, and traversed that the closes were part of the waste of the manor of which *L.* was lord, as alleged in the second plea. The defendant rejoined to the replication to the first plea by traversing the seisin in fee of the parties mentioned therein. At the trial no evidence was given as to close *A.*, and as to the other two, the jury found for the plaintiff:—*Held*, that the issues were divisible, and that the plaintiff was entitled to retain his verdict, and that the defendant was entitled to a verdict as to close *A.* *Phythian v. White*, 714

ISSUES (SEVERAL).

See COSTS, 12—JUDGE (JURISDICTION OF), 11.

JOINDER IN DEMURRER.

See DEMURRER.

JUDGE (AT CHAMBERS).

See AFFIDAVIT (USING).

JUDGE (JURISDICTION OF).

See COUNTS (STRIKING OUT)—EXECUTOR, 1—INTERPLEADER, 7—JUDGE'S ORDER, 1—SMALL DEBTOR, 4—WRIT OF TRIAL, 11.

1. The rule for taxing to the defendants the costs of the two issues found for them was drawn up with this additional clause,—“and that the costs, when so taxed, be paid by the said plaintiff to the said defendants:”—*Held*, that the Court had no power to make such an order, and they directed the record to be amended by an entry of a judgment for the costs of those two issues, upon which the defendants might proceed to ob-

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tain their costs, if they thought proper. *Twigg v. Potts*, 266

2. A bond was conditioned to pay 165*l.* by certain instalments until the whole should be paid. But if default was made in paying any one, the obligation was to remain in force. An action having been brought upon the bond, in consequence of a default in payment of the second instalment, a Judge ordered, that, on payment of 15*l.* and costs, proceedings should be stayed:—*Held*, that the Judge had no power to make such order. *Wilson v. Northorp*, 441

JUDGE'S ORDER.

1. After an order of a Judge at chambers has been made a rule of Court, it is too late to object, in answer to a rule calling upon the party to pay money in pursuance of such order, that the Judge had no power to make it. *Quære*, whether a Judge at chambers has power, during term, to order the attorney to pay the costs of irregular proceedings. *Wilson v. Northorp*, 441

2. An order of a Judge at chambers was obtained in term, for setting aside an irregular judgment with costs: the costs were taxed upon the order, which was then made a rule of Court, and then a personal application was made for the amount:—*Held*, that this was the regular mode of proceeding. *Ib.*

JUDGMENT.

See COGNOVIT, 4—LACHES, 1.

JUDGMENT (ARREST OF).

1. Circumstances shewing a strong probability of the plaintiff's death before the trial, are no grounds for arresting the judgment, or for staying the *postea* in the hands of the associate: the proper remedy is by writ of error. *Johnson v. Hamilton*, 762

2. To a declaration on a bill of exchange with a count for work and

labour, the defendant pleaded as to 35*l.*, part of the money in the declaration mentioned, that the bill as to that sum was an accommodation bill, concluding with a verification; and as to the sum of 40*l.*, other parcel of the sums mentioned in the declaration, he pleaded payment of that money into Court, concluding with a verification; and, as to the residue of the sums and the promise in the last count of the declaration mentioned, and not before pleaded to, *non-assumpsit*. Upon the first plea the plaintiff took issue, and, as to the last plea, added a *similiter*, but said nothing as to the plea of payment of money into Court. At the trial the plaintiff obtained a verdict with 30*l.* damages:—*Held*, that there was no ground for arresting the judgment. *Fallows v. Bird*, 183

JUDGMENT (AS IN CASE OF A NONSUIT).

See COSTS (OF THE DAY).

1. By the practice of the Court of *King's Bench*, the plaintiff, in a country cause, has the whole of the term ensuing that in which issue is joined, to give notice of trial. *Douglas v. Winn*, 559

2. Though a rule absolute for judgment as in case of a nonsuit has been obtained for not proceeding to trial pursuant to a peremptory undertaking, yet if it appears to have been through mistake that notice of trial was not given in time, and no inconvenience has been sustained by the defendant in consequence, the Court will discharge the rule on payment of costs. *Charrington v. Meatheringham*, 479

3. It is no objection to an application for judgment as in case of a nonsuit, that issue was joined seven years previous. *Cromer v. Brown*, 288

4. Where a cause was called on whilst the plaintiff's attorney's clerk

was absent from the Court in consequence of an application made to amend, and the record was therefore withdrawn, but the cause was set down again immediately for trial, and afterwards the defendant obtained a rule nisi for judgment as in case of a nonsuit, whilst the cause was still in the paper, the Court discharged the rule with costs. *Wolsey v. Edwards*, 236

5. The insolvency of the plaintiff after the commencement of the action is not an answer to a motion for judgment as in case of a nonsuit. *Prodrham v. Rust*, 90

6. The poverty of a defendant is not a sufficient excuse for not proceeding to trial, unless it appears that the knowledge of that poverty reached the plaintiff after the commencement of the suit. *Fielder v. Cron*, 50

7. If a defendant, by negotiation, prevents a plaintiff from proceeding to trial in due time after issue joined, he cannot obtain judgment as in case of a nonsuit on account of such delay. *Watkins v. Giles*, 14

8. Countermanding a notice of trial does not interfere with the defendant's right to obtain judgment as in case of a nonsuit, although issue has been joined in the same term as that in which notice is given. *Dennehey v. Richardson*, 13

9. The issue cannot be looked at on a motion for judgment as in case of a nonsuit, unless it is referred to in the affidavit. *Meredith v. Stocker*, 499

10. *Semble*, that judgment as in case of a nonsuit cannot be moved against a plaintiff who has once taken his cause to trial, though it took place before the sheriff, under the Writ of Trial Act, and that the proper course is to get a Judge's order for trying the cause by proviso. *Day v. Day*, 740

11. On a motion for judgment as in case of a nonsuit, the Court only takes notice of the last default. *Jee v. Potter*, 724

12. The lapse of eight years between the joining of issue and the application for judgment as in case of a nonsuit, is no ground for discharging the rule. *Curtis v. Tabram*, 600

JUDGMENT (BY DEFAULT).

See LACHES, 3.

Where judgment in ejectment has been allowed to go by default, the plaintiff, in an action for mesne profits, is entitled to recover his reasonable costs, as between attorney and client, and not merely as between party and party. *Doe v. Huddart*, 437

JUDGMENT (FOR WANT OF A PLEA).

The judgment signed in term for want of plea, where the plea was delivered before eleven o'clock of the day after that on which the time for pleading expired:—*Held*, irregular. *Leigh v. Bender*, 201

JUDGMENT RULE.

See EXECUTION, 1.

JUDICIAL NOTICE.

See WRIT OF TRIAL, 10.

1. The Court cannot entertain an objection patent on a proceeding attached to the affidavit bringing that objection before the Court, if, from wrong intitling, the affidavit cannot be read. *Harris v. Mathews*, 608

2. The Court is bound to take judicial notice that a particular day of the month falls on a Sunday. *Hanson v. Shackelton*, 48

JURAT.

See AFFIDAVIT, 1, 6.

JURY (DISCHARGED).

See COSTS, 5.

JUSTIFICATION (OF BAIL).

See RENDER, 1, 2.

LACHES.

See AFFIDAVIT, 3—AFFIDAVIT (OF DEBT), 5—ARREST, 1—ATTACHMENT, 4—ATTORNEY AND CLIENT, 11—BAIL, 6, 7—BAIL (RELIEF OF), 3—COSTS, 3—COSTS (SECURITY FOR), 5—COURT OF REQUESTS, 2—EJECTMENT, 2, 4—ERROR—IRREGULARITY, 1—JUDGE'S ORDER, 1.

1. Judgment signed in *November*, 1833, plaintiff took no further step till *January*, 1835, when he gave a term's notice of executing a writ of inquiry. In *April*, notice of executing it for the 28th of *May* was served on the defendant in person. On the 27th of *May*, the defendant took out a summons to set aside the judgment for having been irregularly signed after plea delivered, returnable the next day at three o'clock, but it was not attended by the plaintiff's attorney. At four o'clock, the writ of inquiry was executed. On the same day a second summons was taken out, returnable the next day, which was attended and dismissed; and an application was then made to the Court to set aside the judgment and subsequent proceedings for irregularity:—*Held*, that the defendant was too late; and that the summons to set aside the judgment was not, under the circumstances, sufficient to stay the trial of the writ of inquiry. *Roberts v. Cuttill*, 204

2. A defendant being served with a writ of summons, obtained an order for particulars before declaration. After waiting three months, the plaintiff refused to go on with the action, or to enter a *stet processus*; the Court refused an application to compel him to do so. *Kirby v. Snowden*, 191

3. The rule, that an application to set aside a judgment by default on affidavit of merits must be made within a reasonable time, applies as well to

a prisoner as other persons. *Fife v. Bruere*, 329

4. In order to rescind a Judge's order, the proper course is to apply to the Court: therefore, where a writ of detainer issued under a Judge's order, and was lodged at the prison on the 22nd of *October*, and on the 30th a summons was taken out at chambers, returnable on the following day, to discharge the defendant out of custody, on account of the insufficiency of the affidavit to hold to bail, which summons was dismissed; it was held not too late to apply to the Court on the first day of term, to rescind the Judge's order and discharge the defendant out of custody, on account of the insufficiency of the affidavit, and irregularity in the writ.

Semble, where a summons is taken out at chambers on the eighth day after the arrest, to discharge the defendant out of custody, on account of a defect in the affidavit to hold to bail, which summons is returnable the following day, the application is not too late, unless it appears on what part of the day the defendant was arrested. *Johnson v. Kennedy*, 345

5. The illness of a witness to whom a commissioner of the Court might be sent to take his affidavit, is no excuse for delay in making an application to rescind an order for setting aside a writ of summons on the ground of irregularity. *Orton v. Francoe*, 598

6. Where an action was brought by a builder for the amount of extra work done, there having been a written contract between the parties:—*Held*, that the plaintiff ought to have produced the written contract at the trial, in order that it might appear what was within the contract, and what was not. But as the objection was not taken by the defendant at the trial, the Court set aside the verdict

LACHES.

which the jury had found for the defendant; ordered a new trial without costs. *Jones v. Howell*, 176

7. After notice given of an irregularity in declaring, which was denied by the other side, a summons to set aside proceedings was taken out, but a Judge at chambers refused to make an order, or to allow time till the term to move; and the defendant's attorney, to prevent judgment, applied frequently for time to plead, which was consented to:—*Held*, that it was not too late in the next term to move to set aside the proceedings with costs, for the same irregularity for which the summons was taken out. *Woodcock v. Kilby*, 730

8. Where there appears to have been a delay of more than eight days before moving to set aside proceedings for irregularity, the defendant must clearly explain the delay, otherwise the presumption will be against him. *Herbert v. Darley*, 726

LANDLORD.

See EJECTMENT, 3.

LIBEL.

See STATING PROCEEDINGS, 1.

LIEN.

See ATTORNEY AND CLIENT, 12—
COSTS, 8.

The lien of an attorney is only co-extensive with the rights of his client, and therefore as between the plaintiff and defendant the lien of the plaintiff's attorney cannot affect the right of the defendant. *Simons v. Blake*, 263

LIMITATIONS (STATUTE OF).

See WRIT OF RIGHT, 3.

LOCAL ACT.

See WRIT OF TRIAL, 1.

MARKSMAN.

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LOCAL ACTION.

See VENUE, 1.

LORDS' ACT.

1. Where an attorney has been appointed to receive certain monies in furtherance of trusts pursuant to the provisions of the Lords' Act, the Court will not deprive him of that trust unless some ground is shewn for considering him unfit to fulfil it. *Davis v. Lane*, 419

2. If the twenty days' notice to a prisoner under the Lords' Act expires on the first day of a term, he cannot be compelled to appear till the next term. *Buxton v. Squires*, 365

3. On an application to bring up a defendant under the compulsory clauses of the Lords' Act, service of the notice on a creditor by serving it on the landlady of the house in which he lodges, is insufficient, unless it is sworn that she states herself to act as the servant of the creditor, and that such statement is believed to be true. *Wood v. Gompertz*, 276

LUNATIC.

See WARRANT OF ATTORNEY, 6.

MAGISTRATE.

See REMOVAL OF CAUSE, 1.

MALICIOUS ARREST.

See ARREST (WITHOUT PROBABLE CAUSE), 3.

MANDAMUS.

See COURT (HOLDING)—OVERSEER.

The rule for a *mandamus* commanding the ecclesiastical authorities to swear in a churchwarden duly appointed is absolute in the first instance. *Ex parte Lowe*, 15

MARKSMAN.

See AFFIDAVIT, 8.

MARSHAL.

See CHARGING IN CUSTODY.

MARY-LE-BONE VESTRY ACT.

See NOTICE (OF ACTION).

MASTER.

See WITNESS.

MASTER'S DISCRETION.

See ATTORNEY AND CLIENT, 2.

MASTER'S REPORT.

Where it is necessary to move to confirm the Master's report. *Milton v. Rawlings*, 576

MERITS.

See AFFIDAVIT, 5—PLEA (SETTING ASIDE), 2—(WITHDRAWING).

MESNE PROFITS.

See JUDGMENT (BY DEFAULT)—PLEA, 29.

MORTGAGEE.

See PLEA, 16.

MOTIONS (SEPARATE).

See ATTACHMENT, 6, 8, 13.

NAMES.

See AFFIDAVIT, 7.

NECESSARIES.

See PLEA, 28.

NEGLIGENCE.

See ATTORNEY AND CLIENT, 12.

NEW ASSIGNMENT.

See REPLICATION, 1.

In trespass for assault and battery, the defendant pleaded that the plaintiff was his apprentice, and that he behaved saucily and contumaciously, wherefore the defendant moderately

corrected him: the plaintiff replied *de injuriâ*. The jury found the plea, but the correction excessive, and gave one shilling damages.—*Held*, that, upon that issue, the question of excess was not raised, and that it should have been new assigned. *Penn v. Ward*, 215

NEW TRIAL.

See LACHES, 6—WRIT OF TRIAL, 5, 6.

Where a motion for a new trial is by accident delayed beyond the four days, notice ought to be given to the other side, otherwise the expense of intermediate proceedings will fall on the party delaying to move. *Lester v. Lazarus*, 444

NON-ASSUMPSIT.

See PLEA, 9, 18.

NON EST FACTUM.

See VENIRE AD TRIANDUM.

NONPROS.

A defendant having entered an irregular appearance, which he was required by the plaintiff to amend, on a subsequent day and without giving notice to the plaintiff, and after the eight days for the appearance had elapsed, entered a new appearance and demanded a declaration, and afterwards signed judgment of *nonpros* for want of a declaration in due time:—*Held*, that the *non pros* was irregular, and that the defendant ought to have amended his original appearance instead of entering a new one. *Bate v. Bolton*, 160

NONSUIT.

A motion for entering a nonsuit cannot be made, unless leave has been reserved for that purpose by the Judge trying the cause. *Rickets v. Burman*, 578

NOT GUILTY.

See PLEA, 22.

NOTICE.

See AFFIDAVIT (OF DEBT), 3.

NOTICE (OF ACTION).

See ATTORNEY (RESIDENCE OF).

The clause in the *Mary-le-bone* Vestry Act, directing that no action shall be brought for any thing done in pursuance of that act until twenty-one days' notice has been given, only applies to actions for torts, and not to actions of contract. *Fletcher v. Greenwell*, 166

NOTICE (OF APPEAL).

An appellant is not bound by the provisions of the 4 & 5 Will. 4, c. 76, s. 79, to give notice of appeal within twenty-one days after notice of the order of removal being made. *Rez v. Justices of Leicester*, 633

NOTICE (OF COUNTERMAND).

A notice of countermand signed "B. B., plaintiff's attorney," is sufficient, though the name of another attorney is on the record, if the defendant is not misled by it, and the individual signing is really the attorney. *Cheslyn v. Pearce*, 698

NOTICE (OF TRIAL).

1. A defendant after being arrested in *London* on a bill of exchange, and having accepted a declaration with notice to plead in four days, without objection, went over to *Ireland*, and was there when notice of trial was given to his attorney in *London*. Upon an application for a new trial, upon the ground that, being resident in *Ireland*, he was entitled to fourteen days' notice, and not merely to eight days, which had been given, the Court refused to interfere, the affidavit in support of the rule merely stating that the defendant's residence was then, and had been for some past, in *Cork*,

but it did not explain how he came to be in *London* at the time of the arrest, nor where his general place of residence was. *Lencham v. Goold*, 371

2. Where the issue was delivered with notice of trial indorsed for one day, and a separate notice for another, and the defendant, acting on the notice on the back of the issue, did not attend at the trial, on the day mentioned in the separate notice, the Court granted a new trial without costs. *Kerry v. Reynolds*, 234

NOTICE (SERVICE OF).

See LORDS' ACT, 3.

NOTICE (TO PRODUCE).

1. Notice to produce an agreement served upon the defendant's attorney at 5 o'clock on the commission day of the assizes, held too late, the attorney having then left home for the assize town, which was nine miles distant from his office, and the opposite party refusing to furnish him with a conveyance. *George v. Thompson*, 656

2. A notice to produce a tradesman's books served upon the plaintiff's attorney at 7 o'clock of the evening previous to the day of trial is too late. *Atkins v. Meredith*, 658

3. Notice to produce a notice is unnecessary. *Swain v. Lewis*, 261

NULLITY.

See DETAINER—PLEAD (RULE TO)—SUMMONS, 11.

NUNQUAM INDEBITATUS,

See PLEA, 4, 8, 12, 24—REPLICATION, 4.

OMISSION.

See SUMMONS, 7, 9.

OUTLAWRY.

A writ of *capias* may be issued into

a county different from that in which the writ itself describes the defendant as resident; and proceedings to outlawry founded on such a writ are regular. *Morris v. Davis*, 317

OVERSEER.

See STRIKING OUT COUNTS.

Where an overseer is rendered incompetent to serve, in consequence of a conviction under the 4 & 5 *Will.* 4, c. 76, s. 97, and an application is made for a *mandamus* to compel him to deliver up books, &c., belonging to the parish, the conviction must be annexed to the affidavits in support of the rule. *Rex v. Simms*, 294

OYER.

1. A defendant is entitled to demand *oyer* after the original time for pleading has expired, and after an order has been obtained for further time to plead, unless such order on the face of it expressly excludes the defendant from the right to crave *oyer*. *Goodricke v. Turley*, 431

2. In an action of debt upon a bail-bond, the defendant having demanded *oyer*, which the plaintiff refused to grant, pleaded that the bond had not been assigned to the plaintiffs, for the purpose of preventing the plaintiffs from signing judgment for want of a plea:—*Held*, that the defendant, by pleading such plea, had not thereby waived his right to have an inspection of the bond. *Ib.*

PARTNER.

See INTERPLEADER, 13—PLEA, 6.

PART-OWNER.

See PLEA, 1.

PARTICULARS.

See CREDIT (FOR SUMS RECEIVED), 1—LACHES, 2—WAIVER, 1.

PAYMENT (PLEA OF).

PAUPER.

1. The rule of *H. T. 2 Will.* 4, s. 74, does not apply to paupers; and the costs of such of the opposite parties, who have got verdicts, cannot be deducted from the plaintiff's costs of the cause. *Quære*, whether the officers are entitled to any fees as against a pauper. *Gougenheim v. Lane*, 482

2. A pauper plaintiff in an action of trespass, who gets only a farthing damages, is entitled to full costs, and not merely to costs out of pocket. *Ib.*

PAYEE.

See PROMISSORY NOTE.

PAYMENT.

See PAYMENT (PLEA OF), 2.

PAYMENT (INTO COURT).

See CREDIT (FOR SUMS RECEIVED), 2—PLEA, 26.

PAYMENT INTO COURT (PLEA OF).

Where the sum indorsed on the writ of *capias* had been deposited in lieu of bail, the Court refused to permit the defendant to plead payment into Court of a less sum without paying in the money. *Ball v. Stafford*, 327

PAYMENT (PART).

See BILL OF EXCHANGE.

PAYMENT (PLEA OF).

See PLEA, 10, 24.

1. On a plea of payment, if that be the only one, the defendant is bound to begin. *Richardson v. Fell*, 10

2. Payment cannot be given in evidence under the plea of *non-assumpsit* in bar of the action. *Milligan v. Thomas*, 373

PEREMPTORY UNDERTAKING.

1. The costs of enlarging a peremptory undertaking, on account of the absence of a material witness, must be paid by the plaintiff, and are not costs in the cause. *Percival v. Bird*, 748

2. Where the plaintiff has made several defaults in proceeding to trial pursuant to his peremptory undertaking, the Court may make the payment of the costs of the last default a condition precedent to enlarging his last undertaking. *Dennehaye v. Richardson*, 564

3. A plaintiff who has given a peremptory undertaking to try at a particular sitting, is bound to be prepared for that purpose, although the defendant is not ready to proceed. *Saxon v. Swabey*, 105

PERSON (APPEARANCE IN).

A defendant appearing in person is bound by the same rules as he would have been if he had appeared by attorney. *Kerry v. Reynolds*, 234

PLEA.

See ATTORNEY (BILL OF), 1—AWARD, 3—BILL OF EXCHANGE, 1, 2—COSTS, 4—JUDGMENT (ARREST OF), 2.

1. In *indebitatus assumpsit* for money paid, &c., a plea that the money was paid in respect of the defendant's share of certain damages and costs recovered against the plaintiff as part-owner in a vessel (the defendant being another part-owner) for the loss of goods occasioned by the negligence of the plaintiff's servants, but that in fact the loss was owing to the plaintiff's own negligence:—*Held* bad, as amounting to the general issue. A second plea, that the money was claimed as paid on behalf of the defendant as being part-owner,

but that the voyage was undertaken by the plaintiff on his own account only, was held bad for the same reason. *Gregory v. Hartnoll*, 695

2. The declaration in *assumpsit* contained—*first*, a count on a bill of exchange by the indorser against the drawer, and then stated various debts, of 100*l.* each, for goods sold, &c., with the common conclusion in the form given by the rule of *Trinity Term*, 1 *Will.* 4. The defendant pleaded, as to the first count of the declaration, and as to 12*l.* 2*s.*, parcel of 100*l.* in the second count claimed to be due for goods sold, and as to 100*l.* in the second count alleged to be due on an account stated, and the promises made by the defendant in respect thereof, payment of 51*l.* 9*s.* 7*d.* into Court, in the form given by the rule of *Hilary Term*, 4 *Will.* 4; and the general issue was pleaded to the residue:—*Held*, that this plea would have been clearly good to the declaration, except to the count on the bill of exchange; but, *quære*, whether it was good for not specifying how much was paid in on the bill:—*Held, secondly*, that the plea was bad on special demurrer, for treating the claims for goods, money, &c., as one count; inasmuch as those demands, being stated in the form given by the rule of *Trinity Term*, 1 *Will.* 4, are not only to be considered as separate counts with a view to costs, but also for the purpose of pleading. But, *semble*, that if that form is not strictly followed, and there should be several debts or causes of action stated by way of *indebitatus assumpsit*, with one promise only, and without any words to make the promise several *quoad* each of the debts, such count must be treated as several for the purpose of costs, under the rule of *Hilary Term*, 4 *Will.* 4, though it might not be so for the purpose of pleading. *Jourdain v. Johnson*, 534

3. In *indebitatus assumpsit* for goods sold and delivered, it is no plea that the sale and delivery were in pursuance of a contract, which it was agreed should be wholly rescinded. *Edwards v. Chapman*, 732

4. Where, in an action of debt, an agreement to accept 5*l.* in full discharge of the debt was given in evidence upon the plea of never indebted, the plaintiff being allowed to take a verdict for nominal damages, a new trial was refused. *Wright v. Skinner*, 741

5. A plea to an action on a bill of exchange for 43*l.* by an indorsee against the acceptor that, after the bill became due, the drawer gave the plaintiff his promissory note for 44*l.*, in full satisfaction, and that the plaintiff accepted it in satisfaction, is a good answer to the action; and a replication that the note was not paid when due, is bad on demurrer. *Sard v. Rhodes*, 743

6. A plea to a declaration in *assumpsit* for money paid, and on an account stated, that the plaintiff and defendant were partners, and that the cause of action arose out of unadjusted partnership transactions, is bad on special demurrer. *Worrall v. Grayson*, 718

7. To an action on a bill of exchange by the indorsee against the immediate indorser, the defendant pleaded that he indorsed the bill to the plaintiff without *having* or *receiving* any consideration: upon which the plaintiff took issue in the terms of the plea. After verdict for the defendant, the plaintiff moved for judgment *non obstante veredicto*, on account of the insufficiency of the plea:—*Held*, that the plea was good after verdict, though it might have been objected to on special demurrer:—*Held* also, upon error brought in the Exchequer Chamber, that, after the

finding of the jury, it must be taken that there was no consideration for the defendant's promise binding in law, and that the judgment for the defendant ought to be affirmed. *Easton v. Pratchett*, 549

8. In an action for goods sold and delivered, or work and labour, the defendant is at liberty, under the plea of *nunquam indebitatus*, or *non assumpsit*, to shew that the goods were not made in a workmanlike manner, or were not such as were contracted for. *Cousins v. Paddon*, 488

9. If a plea states a payment, or a set-off to a certain amount, but the whole is not proved, the defendant cannot have a verdict on the whole plea, although the sum is alleged under a *videlicet*: but the plea may be taken distributively, and found partly for the defendant, and partly for the plaintiff. *Ib.*

10. A defendant pleading payment and a set-off, who is unable to prove the full amount mentioned in each of the pleas, but proves sufficient to form an aggregate equal to the plaintiff's demand, will be entitled to have judgment on the whole record. *Ib.*

11. To an action against the defendant as drawer and indorser of two bills of exchange, the defendant pleaded, that the plaintiff was applied to for a loan of money to *T. P. B.*, but agreed to give two-thirds of the amount in money and one-third in wine, upon having the two bills given to him as security for the wine; the plea then averred, that the contract for the sale and delivering of the wine was a gross fraud, and that the defendant had not had any value, &c. The plaintiff replied, that there was a good consideration for the drawing, and concluded to the country. On special demurrer to the replication for concluding to the country:—*Held*, that the plea was bad, as being

only an answer to a part, and that the allegation of fraud was too general.

Connop v. Holmes, 451

12. A plea of the general issue in debt on simple contract, must be in the form given by rule 3, tit. "covenant and debt," of *Hilary Term. 4 Will. 4*; and therefore a plea that the defendant "never did owe," was held bad on special demurrer, the form being "never was indebted." *Smedley v. Joyce*, 421

13. To a declaration on a bill of exchange by an indorsee against the acceptor, the defendant pleaded a special plea, shewing fraud on the part of the drawer and the subsequent indorsees, and alleging that the plaintiff took the bill, with a knowledge of those facts; and concluded by averring, that the plaintiff was not a *bond fide* holder of the bill for value. The plaintiff replied, that he was a *bond fide* holder of the bill for value. At the trial a witness was called for the plaintiff, who proved that he applied to him to discount the bill, and that the plaintiff gave him the money for it, upon his putting his name on the bill as indorser. The learned Judge left the case to the jury, upon the credibility of the witness, and upon the question, whether it was a *bond fide* transaction on the part of the plaintiff; observing that the allegations of fraud, as stated in the plea, were admitted by the replication. The jury having found for the defendant, *Alderson and Gurney*, Bs., on a motion for a new trial, held, that the jury were warranted in their finding, and that the verdict ought not to be disturbed. *Parke and Bolland*, Bs., thinking that the jury might have been misled by the observations of the learned Judge as to the effect of the admission on the record, were of opinion that the case ought to be submitted to another jury. *Noel v. Boyd*, 415

14. *Quære*, whether, in an action of

assumpsit, where the plaintiff does not reply *de injuriâ* generally to the facts stated in a plea, the circumstance of his only taking issue on one of them entitles the jury to treat the facts alleged in the plea, and not denied in the replication, as admitted; 1*b*.

15. To an action on a bill of exchange by an indorsee against the acceptor, the defendant pleaded, that after it became due the defendant gave to the holders a bill for a larger sum, and that they accepted it in satisfaction of the first bill, and afterwards indorsed it to one *F. S.*, to whom the money was afterwards paid in satisfaction of that bill, and of all damages sustained by the plaintiff, by reason of its non-payment, and that the indorsement to the plaintiff of the first bill was after the second bill had been given: but the plea did not allege that the second bill was negotiable:—*Held*, on special demurrer, that the plea was sufficient. *Lewis v. Lyster*, 877

16. In an action for use and occupation, the fact of the mortgagee of the premises having given the defendant notice to pay the rent to him, may be given in evidence under the general issue, if the rent sought to be recovered accrued due *after* the notice; but if the rent accrued due *before* the notice, this defence must be specially pleaded. *Waddilove v. Barnett*, 347

17. To an action of slander imputing insolvency to plaintiff, the defendant pleaded that *J. W.*, having occasion in the way of his trade and business to inquire into the solvency and state of affairs of the plaintiff, sent one *W. W.* to the defendant for that purpose, and that defendant then spoke the words in the declaration, believing them to be true:—*Held* bad on special demurrer, as it did not state the words to be spoken *without malice*, or at least *bond fide*. When words are actionable in themselves, a

traverse of the special damage is immaterial and improper. *Smith v. Thomas*, 333

18. In an action for an apothecary's bill, the objection that the plaintiff was not in practice as an apothecary prior to or on the 5th of August, 1815, or had not obtained a certificate from the society of apothecaries, need not be pleaded, but may be rendered available under *non-assumpsit*. *Morgan v. Ruddock*, 311

19. The Court will not, in an action by the indorsee, allow the acceptor of a bill of exchange who negotiates it with the drawer's name indorsed, to plead that it was not indorsed by the drawer to the plaintiff. *Gilmore v. Hague*, 303

20. To a declaration on a bill of exchange, which alleged that the defendant drew the bill and indorsed it to one N., who indorsed it to J. S., who indorsed it to the plaintiff, the defendant pleaded, that his indorsement was in blank, and that he did not deliver the bill to N., but to one L. L., and that L. L. held the bill for the purpose of getting it discounted for the defendant; but, instead of doing so, indorsed it to E. F. without discounting it for the defendant; and that the plaintiff took the bill from E. F. with a knowledge of these facts. The plaintiff replied that the defendant broke his promise without the cause mentioned in the plea, and concluded to the country:—*Held*, that the plea was bad in substance, for want of an averment that no consideration had passed either directly or indirectly to the defendant:—*Held*, also, that the replication was good in substance. *Noel v. Rich*, 228

21. In case for an injury done to the plaintiff's cattle by the defendant's dogs, the plea of not guilty puts in issue the fact not only that the defendant's dogs injured the plaintiff's

cattle, and that the dogs were of a savage disposition, but also that the defendant *knew* them to be so. *Thomas v. Morgan*, 223

22. To a declaration in trespass for assaulting the plaintiff and giving and striking him blows and strokes with a stick and with said defendant's hands and fists, the defendant pleaded, "as to the assaulting the plaintiff with the said stick and with his the defendant's hands and fists, giving and striking the plaintiff blows and strokes as in the declaration mentioned," *son assault demesne*. At the trial, it was proved that the defendant struck the plaintiff a blow with his stick, which it was objected the plea did not cover: but—*Held*, that the plea sufficiently shewed that the blow with the stick was intended to be justified by the plea, and therefore that it covered the declaration. *Blunt v. Beaumont*, 219

23. To a declaration containing the common counts the defendant pleaded, as to part, that he was not indebted, and as to the residue, that he paid it before the commencement of the action, and concluded to the country. Upon special demurrer to the latter plea:—*Held*, bad. *Mack v. Rust*, 206

24. To a declaration of *assumpsit* on a bill of exchange with the common counts, the defendant pleaded as to 83*l.* parcel thereof, that after the causes of action accrued, an agreement was made between the plaintiffs and the defendant, that the latter should secure that sum by a further mortgage upon property with a power of sale, and part of that money to carry interest at 5*l. per cent.*, and the whole to be paid by instalments; and that the plaintiffs agreed that no proceedings should be taken in respect of that sum, unless upon default of payment of the instalments as they should become due, and that the defendant was always ready to execute

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such further mortgage, but had not been called upon so to do. Upon special demurrer to this plea, on the ground, amongst others, that it amounted to accord without satisfaction:—*Held*, bad. *Allies v. Probyn*,
153

25. A plea of payment into Court upon two breaches in covenant, jointly, is good, without specifying how much is intended to be applied to each breach. *Marshall v. Whiteside*,
766

26. A declaration upon a covenant, whereby *A.* and *B.* jointly and severally covenanted to repair during the term, alleged as a breach, that neither *A.* nor *B.* whilst the latter was unmarried, nor *A.* nor *B.*, nor *C.* her husband, since the marriage of *B.* with *C.*, did repair during the term, &c. A plea that *A.* and *B.* and *C.* did, during the term, repair, &c., is bad on special demurrer. *Id.*

27. *Quære*, if in an action against a husband for goods supplied to his wife, it is necessary to plead specially the adultery of the wife. *Symes v. Goodfellow*,
642

28. To a declaration in trespass by *John Doe* as plaintiff, the defendant pleaded, that the premises were not the premises of the plaintiff:—*Held*, that under this plea the defendant was at liberty to prove title in himself, the judgment in ejectment not being *conclusive* against the defendant, unless shewn upon record. *Doe v. Huddart*,
437

PLEA (AMENDMENT OF).

A plaintiff cannot object to an amendment of the defendant's pleas on the ground of a witness who has gone abroad having been examined with respect to the issue then joined, if the plaintiff has had notice of the proposed amendment before the examination took place. *Hollingsworth v. Briggs*,
640

PLEA (SETTING ASIDE). 813

PLEA (FRIVOLOUS).

1. In an action for rent, for two years' use and occupation, judgment was signed for want of a plea, but was set aside on an affidavit of merits and pleading issuably, &c. The defendant pleaded, that the two years' rent became due under a lease, and after a fiat had issued against him, and he had been declared a bankrupt; and that after the rent became due, he applied to the assignee to accept or decline the lease, and that the assignee declined the lease, and thereupon the defendant tendered the lease and possession to the landlord, who accepted the same. This plea was pleaded at the end of *Trinity Term*, too late to be argued in that Term. The Court discharged the rule for setting aside the judgment, as they considered the plea frivolous. *Worthington v. Prince*,
243

2. The mere fact of a plea being clearly insufficient in point of law, is not a ground for signing judgment as for want of a plea. *Comper v. Jones*,
591

PLEA (INCONSISTENT).

Where to trespass for seizing goods, the defendant pleaded two pleas, one justifying upon a distress for rent due under a demise at 5*l.* a year, and another for 2*l.* 10*s.*, and both issues were found for him:—*Held*, that they were not inconsistent. *Twigg v. Potts*,
266

PLEA (SETTING ASIDE).

1. The Court will not, upon affidavit, set aside a plea upon which issue may be taken. *La Forest v. Langan*,
642

2. A defendant who was under terms to plead *issuably* in an action against him as acceptor of a bill of exchange by an indorsee, pleaded that he had received no consideration from the plaintiff, and the plea was delivered

814 PLEA (SETTING ASIDE).

solate in *Trinity* Term that there was not sufficient time to get the demurrer argued that term. The Court ordered the plea to be set aside, and that the plaintiff should be at liberty to sign judgment unless the defendant consented to amend upon payment of all costs, and going to trial at the next sittings. *Semble*, that an affidavit of merits made by the defendant's attorney as to his belief, from instructions received, is insufficient, when the defendant himself might make the affidavit. *Brown v. Austin*, 161

PLEA (WITHDRAWING).

After a bad plea of "no consideration" to a declaration on a bill of exchange, by which the plaintiff has been delayed the long vacation, the Court will, under special circumstances, allow the defendant to withdraw his plea and plead *de novo* and have an inspection of the bill without an affidavit of merits. *Paplief v. Codrington*, 497

PLEAD (RULE TO).

1. A judgment signed (after a defective plea delivered) as for want of a plea, is irregular, unless a rule to plead has been given. *Warne v. Beresford*, 361

2. A rule to plead in a wrong name is a nullity. *Ib.*

PLEADING (TIME FOR).

See Oyer, 1.

PLEAS (SEVERAL).

1. Where it is doubtful whether a statutable objection to the contract can be rendered available under the plea of *non assumpsit*, the Court will allow it to be specially pleaded. *Smith v. Dixon*, 571

2. In an action by the assignees of a bankrupt, the Court will allow the bankruptcy to be put in issue if the

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fact be doubtful, along with a plea of mutual credit and payment into Court.

The rule is absolute in the first instance. *Atkinson v. Duckham*, 327

POOR-LAW ACT.

See NOTICE (OF APPEAL)—OVERSEER —WITNESS (COMPETENCY OF).

POSTEA.

See WRIT OF TRIAL, 10.

If a plaintiff succeeds and recovers damages only as to part of his cause of action, he is still entitled to the *postea*. *Smith v. Edwards*, 621

POUNDAGE.

The sheriff is entitled to poundage on the sum received under the execution only, and not on the amount claimed or seized. *Rex v. Robinson*, 447

POVERTY.

See JUDGMENT AS IN CASE OF A NON-SUIT, 6.

POWER.

See ATTACHMENT, 7.

PRESENTMENT.

See AFFIDAVIT (OF DEBT), 3, 6.

PRESUMPTION.

See LACHES, 8.

PRINCIPAL AND AGENT.

See INSPECTION (OF BOOKS)—PLEA, 1.

PRISONER.

See AFFIDAVIT (OF DEBT), 5—*COGNOVIT*, 1, 2, 3—*DEPONENT (RESIDENCE OF)*, 1, 2—*LACHES*, 3, 4.

1. Where a warrant on a charge of felony is lodged with the warden against a prisoner in his custody for debt, he is authorized in confining him in the strong-room, and the Court will not summarily relieve him from

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his close confinement. *Osborne v. Angle*, 342

PRISONER (MOTION TO DISCHARGE).

Where a motion is made to discharge a prisoner out of custody on the ground of irregularity in the process, it must be positively alleged in the affidavit that the party was taken into custody upon the process. *Green v. Rohan*, 659

PROCEEDINGS (SETTING ASIDE).

See AFFIDAVIT, 5.

PROFERT.

See DECLARATION, 7.

PROHIBITION.

See COURT OF REQUESTS, 1.

PROMISSORY NOTE.

An indorsee of a promissory note, not overdue, but the amount of which is exceeded by a cross-demand of the maker on the payee, having notice of such demand at the time of the indorsement, cannot recover against the maker advances made to the payee on the note subsequent to such notice, although the note is a distinct transaction between the original parties. *Goodall v. Ray*, 76

REFORM ACT.

See COURT OF REQUESTS, 1.

RELEASE.

Where one of several plaintiffs, assignees of a bankrupt, releases the cause of action, and the release is pleaded, the Court will set aside the plea, suspicion being thrown on the defendant's conduct in the transaction, the co-plaintiffs indemnifying

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the plaintiff who had given the release against costs. *Johnson v. Holdsworth*, 63

REMOVAL OF CAUSE.

See CERTIORARI.

1. The mere fact of a defendant, on an indictment for an assault, being a member of the bench of magistrates who are to try it, is not a sufficient ground, within the 5 & 6 Will. 4, c. 33, s. 1, for removing the indictment by certiorari. *Rex v. Fellomes*, 607

2. In order to obtain execution on a judgment from the Court of Common Pleas at Lancaster, under the 4 & 5 Will. 4, c. 62, s. 31, it is necessary not only to have the certificate of the prothonotary, but also an affidavit that the defendant has removed his person or goods, or both, out of the jurisdiction. *Duckworth v. Fogg*, 396

RENDER.

See ATTACHMENT (SETTING ASIDE), 1—ATTACHMENT (STANDING AS A SECURITY), 1—BAIL, 10—DEPOSIT (IN LIEU OF BAIL), 4.

1. Where an attachment has been obtained against the sheriff for not bringing in the body, it is not necessary that bail above, who are afterwards put in for the purpose of rendering the defendant, should justify before such render is made, in order to entitle them to set aside the attachment on payment of costs. *Rex v. Bean*, 673

2. Though rendering a defendant is equivalent to justifying bail for the purpose of setting aside proceedings against the sheriff, yet where a Judge's order was obtained for time to justify bail, and the defendant was rendered instead of the bail being justified, the Court would not set aside an attach-

ment afterwards obtained, except on payment of costs. *Rea v. The Sheriff of Middlesex*, 358

3. Notice of rendering having been given to the plaintiff's attorney, he, notwithstanding, took an assignment of the bail-bond and commenced proceedings, as no notice of bail had been given, and no entry of the render could be found upon searching the books:—*Held*, that the proceedings were irregular. *Short v. Doyle*, 202

4. *Semble*, that *Dover Castle* is the county gaol (upon an arrest in the *Cinque-Ports*) to which to render a defendant, within the 11 *Geo.* 4 & 1 *Will.* 4, c. 70, s. 21, and *R. G. Exch. Mich. T.* 1 *Will.* 4, reg. 12. *Stride v. Hill*, 709

RENT.

See PLEA, 16.

REPLICATION.

See PLEA, 21.

1. To a declaration in *assumpsit* for money had and received, plea, that the money so received by the defendant was the produce of goods consigned to and deposited with the defendant by *P. & C.* as their own goods, with the knowledge of the plaintiff, but which were in fact the goods of the plaintiffs and *P. & C.* jointly, for the purpose of securing advances by the defendant to *P. & C.*, and with a power of sale to reimburse him for such advances; and that the goods were sold by the defendant to cover advances made to *P. & C.* in ignorance that plaintiffs were interested in the goods, and the defendant offered to set off the amount of those advances against the proceeds of the goods. The plaintiffs replied that the defendant broke his promise of his own wrong, and without the

REPLICATION.

cause mentioned in the plea, and then new assigned that the action was brought for the proceeds of certain other goods which the defendant had promised to pay to the plaintiffs. Upon demurrer to the replication and new assignment for duplicity:—*Held*, that the plea was bad, amounting to the general issue, and that the replication of *de injuriâ* was bad in itself, as not being applicable to the plea, nor allowable if the right to reply *de injuriâ* in *assumpsit* is to be governed by the same rules as obtain in trespass. *Semble*, that the new assignment might be supported. *Solly v. Neish*, 248

2. Where, in *assumpsit*, the plea admits the breach, and only alleges a number of facts as matter of excuse, the replication of *de injuriâ* is proper.

To a declaration on a promissory note, by an indorsee against the maker, the defendant pleaded, that an advertisement appeared in a newspaper, offering loans of money at low interest, and that the defendant, being in want of a loan, was induced, by the false representations of the individuals to whom he applied, to draw that and other promissory notes, for which he never had any consideration, and that all the parties to the bill were acquainted with these circumstances:—*Held*, upon special demurrer, that *de injuriâ* was a proper replication to this plea. *Isaac v. Farrar*, 750

3. The replication *de injuriâ* will in future be allowed in actions of *assumpsit*. *Griffin v. Yeates*, 647

4. If the plaintiff replies *nunquam indebitatus* to a plea of set-off, and the defendant proves his plea, the plaintiff will not be at liberty under his replication to shew that the sum proved, or even any part, has been paid. *Brown v. Daubeny*, 585

5. The new rules of pleading do not apply to replications. *Ib.*

RESIDENCE.

See CAPIAS, 1—OUTLAWRY—SUMMONS, 6.

RETURN (TO FI. FA.)

See SHERIFF, 2.

A *fi. fa.* having been delivered to the sheriff's officer on the 23rd of April, on the following day the officer wrote a letter stating that the defendant was only a lodger, and had no effects; in consequence of which letter, the plaintiff on the succeeding day lodged a *ca. sa.* with the sheriff's deputy in London. On the 29th, the plaintiff having heard that the defendant had goods, and that the letter of the officer was false, wrote to the officer, directing him not to arrest the defendant, but to take his goods; and, on the 1st of May obtained a side-bar rule for a return of the writ of *fi. fa.* The sheriff applied to discharge that rule on the ground that the *fi. fa.* was superseded by the *ca. sa.* subsequently issued:—*Held*, that, whether it was so or not, the plaintiff had a right, under the circumstances, to have a return to the *fi. fa.* *Smith v. Johnson*, 208

REWARD.

See INTERPLEADER, 4.

RULE (DISCHARGED).

See COSTS, 6.

RULE (ENLARGING).

See AFFIDAVIT, 3—AFFIDAVIT (FILING).

RULE (MOVING FOR).

See AFFIDAVIT, 9.

RULE (SERVICE OF).

See AFFIDAVIT (OF SERVICE)—ATTACHMENT, 5, 14, 15.

1. A rule *nisi* to compute, served by leaving a copy at a warehouse,
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where the bill of exchange was made payable, but which was shut up at the time:—*Held*, insufficient service. *Castle v. Sowerby*, 669

2. Where it is clearly shewn that an attorney keeps out of the way to avoid being served with rules for the payment of money, the Court will allow service upon his clerk to be good service. The affidavit, however, must specify the endeavours to effect a service, and the reasons for believing that he is in town, and avoiding service. *Hinton v. Dean*, 352

RULE (TO COMPUTE).

See RULE (SERVICE OF), 2.

SCIRE FACIAS.

1. To a *scire facias* in the Court of Exchequer, on a judgment obtained in the Court of Great Session, before its abolition by the 11 Geo. 4 & 1 Will. 4, c. 70, the defendant pleaded that, by the practice of the Court of Great Session, an affidavit ought to have been first made of the amount of the debt really due, which had not been done:—*Held*, bad on demurrer, as well because it was a mere matter of practice, as because that practice was in fact abolished with the Court; and that the only mode of making the objection available was by motion to the discretion of the Court, who would have ordered such an affidavit to be made, or not, as might appear right under the circumstances. *Howell v. Bowers*, 386

2. The rule for quashing a *sci. fa.*, on the application of the plaintiff after appearance and before plea, is *nisi* in the first instance, although on the terms of paying costs. *Ade v. Stubbs*, 282

3. If a plaintiff issues a second *sci. fa.* on one judgment, and in the declaration on such second *sci. fa.* he misrecites the proceedings on the prior one, he may abandon that,

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amend, and proceed on the original judgment. *Klos v. Dodd*, 67

4. An application for a *scire facias*, upon a judgment ten years old, will not be granted upon an affidavit of the plaintiff's present attorney, which merely states that the debt and costs are still unpaid: it must also be shewn that he was the attorney when the judgment was obtained, or there must be an additional affidavit of the attorney then employed. *Duke of Norfolk v. Spencer*, 746

SERVICEABLE PROCESS.

See UNIFORMITY OF PROCESS ACT.

SERVICE (OF PROCESS).

Though the service of process should be personal to entitle a plaintiff to enter a common appearance, the Court will not set aside proceedings on an affidavit of defendant, that he has not been personally served, accompanied by an affidavit of his daughter, that she received and opened the letter containing the copy of the writ. *Herbert v. Darley*, 726

SETTING ASIDE PROCEEDINGS.

See AFFIDAVIT, 5.

SET-OFF.

See ARREST (WITHOUT PROBABLE CAUSE), 1.

SET-OFF (OF COSTS).

See COSTS, 1, 2, 7, 8—PAUPER, 1.

SET-OFF (PLEA OF).

See PLEA, 10.

SEVERAL DEFENDANTS.

See COSTS, 1.

SEVERING COUNTS.

See COSTS, 7.

SHERIFF.

See ATTACHMENT (STANDING AS A SECURITY), 1—CAPIAS, 2—CHARG

ING IN CUSTODY—INTERPLEADER, 1, 2, 3, 6, 7, 8, 9, 10, 11, 12, 13
—POUNDAGE—RENDER, 1—RETURN (TO FI. FA.)

1. A sheriff, against whom an action for falsely returning that money deposited with him by a defendant in lieu of bail had been paid into Court, had been brought, was allowed to pay into Court in the original action the money so deposited, though the plaintiff had been delayed two months by the sheriff's neglect. *Hall v. Jones*, 712

2. The mere fact of a plaintiff requesting the sheriff to direct his warrant to a particular officer, does not constitute the latter a special bailiff, so as to render him the plaintiff's agent. The fact of a compromise between the parties, or of a claim for rent by the landlord, does not relieve the sheriff from the necessity of making a return to a writ of *fi. fa.* *Balson v. Meggat*, 557

3. The Court will not interfere to restrain a sheriff from selling goods seized by him under a *fi. fa.*, on an offer of indemnity by a third person claiming the goods. *Harrison v. Forster*, 558

4. The sheriff is not liable in trespass for the act of the bailiff of a county court in taking the goods of a stranger, upon process directing him to take the defendant's goods. *Tunno v. Morris*, 224

5. Where the plaintiff's attorney obtained from the sheriff's deputy, in London, a warrant which he sent to an officer in the country by the post, but did not pay the postage, and the officer having in consequence refused to take in the letter, it was returned to the dead-letter office:—*Held*, that under these circumstances, the sheriff could not be called on to return the writ. *Hart v. Weatherley*, 171

SIGNED BILL.

See ATTORNEY (BILL OF), 2.

SLANDER.

SLANDER.

See *AUDITA QUERELA—DECLARATION*, 3—*PLEA*, 17.

SMALL DEBTOR.

1. Where a defendant has remained in execution for twelve successive calendar months for a debt of 20*l.*, and 1*s.* damages, in an action of debt, he is entitled to his discharge under the 48 *Geo.* 3, c. 123, s. 1. *Fogarty v. Smith*, 595

2. It is no objection to the discharge of a debtor, under the 48 *Geo.* 3, c. 123, that the amount of the debt for which he is in execution is exactly 20*l.* *Thomson v. King*, 582

3. In order to obtain a defendant's discharge, under the 48 *Geo.* 3, c. 123, the service of the notice of application must be on the plaintiff himself, and not on his attorney. *Gordon v. Twine*, 560

4. Where a defendant is in custody in any other prison than the *Fleet*, he cannot be discharged in the *Exchequer* under the Small Debtors' Act, unless a copy of the causes in which the defendant is in custody has been procured and verified by the proper officer. Such a motion cannot be made at chambers. *Short v. Williams*, 357

5. A defendant is entitled to his discharge under the 48 *Geo.* 3, c. 123, although he has been out occasionally on day rules during the twelve months. *Boughey v. Webb*, 320

6. Where a defendant seeks to obtain his discharge under the 48 *Geo.* 3, c. 123, the plaintiff being dead, he must serve the notice on the personal representative of the deceased, or shew that there was no personal representative, before a notice to the attorney of the plaintiff will be considered sufficient. *Ex parte Richer*, 275

7. If a prisoner seeking his discharge under 48 *Geo.* 3, c. 123, for

STAYING PROCEEDINGS. 819

a debt not exceeding 20*l.*, has not given ten days' notice of his application, the rule for his discharge will only be *nisi* in the first instance. *Moore v. Clay*, 5

8. In order to obtain a discharge under 48 *Geo.* 3, c. 123, it is not sufficient that the notice should be left "with a female at the plaintiff's residence." *George v. Fry*, 273

SON ASSAULT DEMESNE.

See *PLEA*, 23.

SOUTHWARK COURT OF REQUESTS.

See *COURT OF REQUESTS*, 4.

SPECIAL BAILIFF.

See *SHERIFF*, 2.

STAYING PROCEEDINGS.

1. Where several actions are depending in different Courts for the same cause of action, though one Court will not allow its proceedings to be dependent on those of another, yet where, in an action for a libel brought in the *Common Pleas*, to which a justification was pleaded, the jury found for the defendant, and a rule *nisi* was then obtained for entering a verdict for the plaintiff on the special plea, with a farthing damages, on the ground that the justification was insufficient, the Court of *Exchequer* allowed the defendant in another action here (for the same libel) against other persons, to have further time for pleading until the sittings in the next term, and afterwards again enlarged the time to the following term, in order that the defendant might know the decision of the Court of *Common Pleas*, as to the validity of the plea. *Clark v. Allbut*, 684

2. The Court will not grant a rule for staying proceedings on the last day of term. *Doe d. Smith v. Hardy*, 356

3. Where a defendant was sued for the price of goods after he had received a letter from the plaintiff, who was abroad, not to pay except to his written order, the Court, on the application of the defendant, ordered proceedings to be stayed on the money being brought into Court, although the defendant had pleaded the facts by way of defence. *Newton v. Matthews*, 237

4. Where the defendant fails to pay the debt and costs within the time mentioned in the indorsement of the writ, he is not entitled to a stay of proceedings on payment of the sum so indorsed. *Bowditch v. Slaney*, 140

STRIKING OUT COUNTS.

A declaration in ejectment on the demise of the churchwardens and overseers of a parish, to recover parish property, contained two sets of counts; one specifying the names of the individuals, and the other not. The Court ordered one set to be struck out. *Held*, also, that a motion for that purpose, involving a point of law and the construction of an act of Parliament, was properly brought before the full Court. *Doe d. Churchwardens and Overseers of the Parish of Llandesilio v. Roe*, 222

SUBPCENA.

See ATTACHMENT, 9.

It is not competent for a person served with a *sub. duc. tec.* to shew that the instrument he was required to produce was immaterial in the cause, in answer to a rule for an attachment. *Doe d. Butt v. Kelly*, 273

SUGGESTION.

See ARREST (WITHOUT PROBABLE CAUSE)—COSTS (DOUBLE)—COURT OF REQUESTS, 2, 3.

SUMMONS.

See DECLARING (TIME FOR)—LACHES, 5—VARIANCE, 2.

1. The return day of the summons in a writ of right may be amended before it is executed. *Miller, Demandant; Miller, Tenant*, 144

2. "No. 1, Clifford's Inn Passage, Fleet Street, London," held a good description of the residence of the party by whom a writ is issued, within the 2 Will. 4, c. 39, s. 12, without naming any parish. *Arden v. Jones*, 120

3. It is sufficient to describe an attorney plaintiff, in the indorsement on a writ of summons, as "of" a particular place, without stating him to reside there. *Yardley v. Jones*, 45

4. An attorney plaintiff's place of business is the proper "residence" of which to describe him.

Semble, that if he were described of his private house, where he did not carry on his business, it would be sufficient also. *Ib.*

5. An alteration in the order of the words of the indorsement, or the addition of others, is immaterial, if the sense remains the same. *Ib.*

6. "*Tufton Street*, in the county of *Middlesex*," is a sufficient description of a defendant's residence in a writ of summons. *Cooper v. Wheale*, 281

7. The omission of the word "on" before the word "promises," in describing the form of action in a writ of summons, is immaterial. *Ib.*

8. Where an objection is made to a writ of summons, on the ground that the defendant's residence is improperly described, as being in one county instead of another which adjoins, the affidavit must be positive as to the fact, and ought to aver that there is no dispute about the boundaries. *Lewis v. Norton*, 355

9. The omission of the words "on promises" in a writ of summons is only a ground of setting aside the copy served, and not the writ itself. *Chalkley v. Carter*, 480

SUMMONS.

10. A writ being to answer the plaintiff in an action of trespass on the case followed by a declaration in trover:—*Held*, regular. *Bate v. Bolton*, 160

11. A writ of summons, dated on a *Sunday*, is a nullity, and the objection is not waived by lapse of time. *Hanson v. Shackelton*, 48

SUNDAY.

See IRREGULARITY, 2—JUDICIAL NOTICE, 2—SUMMONS, 11.

SURPLUSAGE.

See DECLARATION, 6.

TAXATION.

See ATTORNEY (BILL OF), 3—ATTORNEY AND CLIENT, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11—COGNOVIT, 4—INTEREST—JUDGE (JURISDICTION OF), 1.

TECHNICAL OBJECTION.

See AFFIDAVIT, 5.

TENANT (IN COMMON).

See EJECTMENT, 14.

TENANT (IN POSSESSION).

See EJECTMENT, 6, 15.

TESTAMENTARY GUARDIAN.

A mother cannot legally appoint a testamentary guardian of her natural child, and therefore such a guardian, if appointed, cannot have a *ha. cor.* to remove such child from the custody to which it was committed by the mother during her lifetime. *Ex parte Glover*, 291

TIME (IMMATERIAL).

See DECLARATION, 4.

TOLLS.

See COUNTS (SEVERAL), 2.

TRANSCRIPT.

See ERROR.

VARIANCE.

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TRESPASS.

See COSTS, 10, 11, 14—DEFENDANT'S COSTS—ISSUES (DIVISIBLE)—NEW ASSIGNMENT—PAUPER, 2—PLEA, 23—SUMMONS, 10.

TRIAL (LOSS OF).

See ATTACHMENT (STANDING AS A SECURITY), 1, 2—BAIL, 10—BAIL-BOND, 2.

TROVER.

Property being attached in the hands of the defendant, under a foreign attachment against *A.*, in an action of trover by *B.*, the real owner, the refusal by the defendant, as garnishee, to deliver it up, is no proof of a conversion by him. *Verrall v. Robinson*, 242

UMPIRE.

See ARBITRATION, 6.

UNDER-SHERIFF.

See INTERPLEADER, 11.

UNDER-SHERIFF'S DEPUTY.

See EXECUTION (CHARGING IN), 1.

UNIFORMITY OF PROCESS ACT.

See ATTORNEY (PRIVILEGE OF), 1, 2.

The 17th section of the Uniformity of Process Act, as to attorneys declaring whether writs have been sued out in their names, applies both to serviceable and bailable process. *Gilson v. Carr*, 618

USE AND OCCUPATION.

See PLEA, 16.

VACATION.

See ATTORNEY (RE-ADMISSION OF), 1, 2—BAIL (FIXING)—IRREGULARITY, 1—LACHES, 7.

VARIANCE.

See AMENDMENT—IRREGULARITY, 2—SUMMONS, 10.

1. Where a plaintiff sues out a *capias* against two, and he arrests one only, he cannot declare against him alone. *Carson v. Donding*, 297

2. A writ was to answer the plaintiff "in a special action," the declaration was "on promises." A rule to set aside the declaration for irregularity was discharged with costs. *Moore v. Archer*, 214

3. In covenant the declaration stated that the defendant covenanted to pay a certain sum of money at a certain time. Upon *oyer*, the covenant appeared to be to pay the money at that time, and also *at a particular place*. The defendant demurred, and assigned the variance as a cause of demurrer:—*Held*, that there was no material variance. *Paine v. Emery*, 191

VENIRE (AD TRIANDUM).

In debt on a bond, conditioned for paying money, and also for performing covenants in an indenture, the declaration, after setting out the condition, alleged a breach in the non-payment of the money. The defendant pleaded *non est factum*:—*Held*, that upon this issue a *venire ad triandum* was sufficient to warrant the jury in assessing the damages. *Quin v. King*, 736

VENUE.

1. An application by the plaintiff to change the *venue* in a local action, under the 3 & 4 *Will.* 4, c. 42, s. 22, cannot be made till issue is joined. *Bell v. Harrison*, 181

2. In an action on a specialty, an application to change the *venue* cannot be made until after issue joined. *Youde v. Youde*, 32

VERDICT.

See AWARD, 7.

WARRANT (OF ATTORNEY).

WAIVER.

See AWARD, 7—*BAIL*, 9—*DECLARATION (WITHDRAWING)*—*LACHES—OYER*, 2—*SUMMONS*, 11—*WRIT OF TRIAL*, 1, 7.

1. A declaration in *assumpsit*, indorsed to plead in four days, being delivered, with particulars of demand annexed, the plaintiff, two days afterwards, finding that the particulars were wrongly intitled, delivered a fresh particular properly intitled; and, for want of a plea within the four days, signed judgment:—*Held*, that the judgment was regular, the accepting the amended particulars being a waiver of the objection to the first. *Jones v. Fowler*, 232

2. A party who applies to a Judge for indulgence, and obtains it on certain terms, may draw it up or not, as he thinks proper; and the opposite party, by drawing it up himself, without the consent of the party applying, does not thereby make it operative against him. *Wright v. Skinner*, 727

3. The entry of an appearance by a plaintiff for a defendant does not operate as a waiver of an objection to the copy of the writ. *Chalkley v. Carter*, 480

4. Two months' delay in taking the objection to the affidavit of debt, that it is not sworn before a legal commissioner, is not a waiver of it. *Sharpe v. Johnson*, 324

WARDEN.

See PRISONER.

WARRANT (OF ATTORNEY).

1. On applying for judgment on an old warrant of attorney, it is sufficient proof of the defendant being alive that a letter in his handwriting has been received. *Gray v. Withers*, 636

2. In order to obtain leave to sign judgment on an old warrant of attorney, it is necessary to shew that the

WARRANT (OF ATTORNEY).

defendant was "alive," and not merely "seen" within a reasonable time before the application. *Chell v. Oldfield*, 629

3. Judgment may be obtained on an old warrant of attorney, although only an office copy of the affidavit of its due execution is produced. *Webb v. Webb*, 599

4. In order to obtain judgment on an old warrant of attorney, it is sufficient if the affidavit states that the defendant was "seen alive within ten days." *Krell v. Joy*, 600

5. The affidavit of the attesting witness to a warrant of attorney, cannot be dispensed with merely on the ground of his illness. *Owen v. Holles*, 572

6. It is no objection to signing judgment on a warrant of attorney under fifteen years old, that the defendant is insane. *Piggot v. Killick*, 287

7. The Court will allow judgment to be entered up on an old warrant of attorney on the 17th of May, although the defendant has not been seen alive since the 23rd of April previous. *Watts v. Bury*, 44

WITNESS.

The Court has no power to compel a witness to attend to give evidence before the Master. *M'Dougall v. Nicholls*, 76

WITNESS (COMPETENCY OF).

A witness for the defendant, who at the time of the contract entered into was one of the guardians of the poor, but who at the time of the trial had ceased to be so:—*Held*, to be competent. *Fletcher v. Greenwell*, 166

WITNESS (EXAMINING BEFORE COMMISSIONERS).

The Court will not stay the issuing of a commission to examine witnesses

WRIT OF TRIAL. 823

abroad on the ground of the plaintiff being indebted to the defendant for certain costs in equity. *Oughan v. Parish*, 29

WRIT (ALTERATION OF).

A plaintiff cannot alter his writ after service; and a notice not to appear to the copy of the writ first served, will not cure the defect. *Glenn v. Wilks*, 322

WRITTEN CONTRACT.

See LACHES, 6.

WRIT OF RIGHT.

See SUMMONS, 1.

1. Until a writ of right has been returned, the Court of *Common Pleas* has no jurisdiction in the cause. *Foot v. Sheriff*, 652

2. The Court of *Common Pleas* has no power to set aside a writ of right, that being a writ out of *Chancery*, *ib.*

3. A writ of right issued on the 29th December, 1834, returnable on the 26th January, 1835. The return day was altered from term to term until it was finally made returnable in November, 1835:—*Held*, that the re-sealing made it a new writ, and the right of action was barred by the 3 & 4 Will. 4, c. 27, s. 36. *Leigh v. Leigh*, 650

WRIT OF TRIAL.

See JUDGMENT (AS IN CASE OF A NON-SUIT), 10.

1. A defendant, by consenting to a cause being tried before the sheriff, under the Writ of Trial Act, knowing at the time that he was liable to be sued for the debt in a local Court only, does not thereby waive his right to claim costs from the plaintiff, upon his recovering less than 5*l.*

A local act gives treble costs to a defendant who is sued for less than 5*l.* in any other than the local Court,

so as it shall appear to the Judge or Judges of the Court where the action is tried that the debt is under 5*l.*, and the defendant shall give evidence, to be allowed of by the Judge of the Court where such action is brought, that the defendant is resident within the local jurisdiction. The cause is tried by the under-sheriff, under the Writ of Trial Act, and the defendant gives evidence of his residing in the local jurisdiction, and the plaintiff recovers less than 5*l.* *Quære*, whether the Court above can give costs to the defendant under the act? *Shaw v. Oates*, 720

2. It is no ground of objection to an issue being tried before the sheriff, that the defendant will endeavour to avail himself of the Gloucester Court of Requests Act. *Crood v. Harris*, 616

3. If the sum indorsed on the writ of summons exceeds 20*l.*, the cause cannot be tried before the sheriff, but the Court on motion, at the instance of the plaintiff, will amend the indorsement by substituting a less sum, being the amount due upon the balance, so as to obtain a writ of trial. *Frodsham v. Round*, 569

4. The Writ of Trial Act was only intended to apply to very plain questions; and after a Judge at chambers has refused to make an order, *semble*, that the Court will not entertain a motion for reviewing his decision; not, at least, unless all the facts of the case, with what took place before the Judge, are brought specially before the Court. *Davies v. Lloyd*, 478

5. A motion for a new trial must in all cases be made within the four days, even though the cause may have been tried before the sheriff in a distant county. If the four days are in-

sufficient, a special application must be made to the Court for further time. *Wheeler v. Whitnore*, 235

6. A motion for a new trial in a cause heard before the sheriff under the Writ of Trial Act must be made within the four days; and if the sheriff's notes cannot be obtained within that time, there must be a special affidavit of facts. *Muppin v. Gillatt*, 190

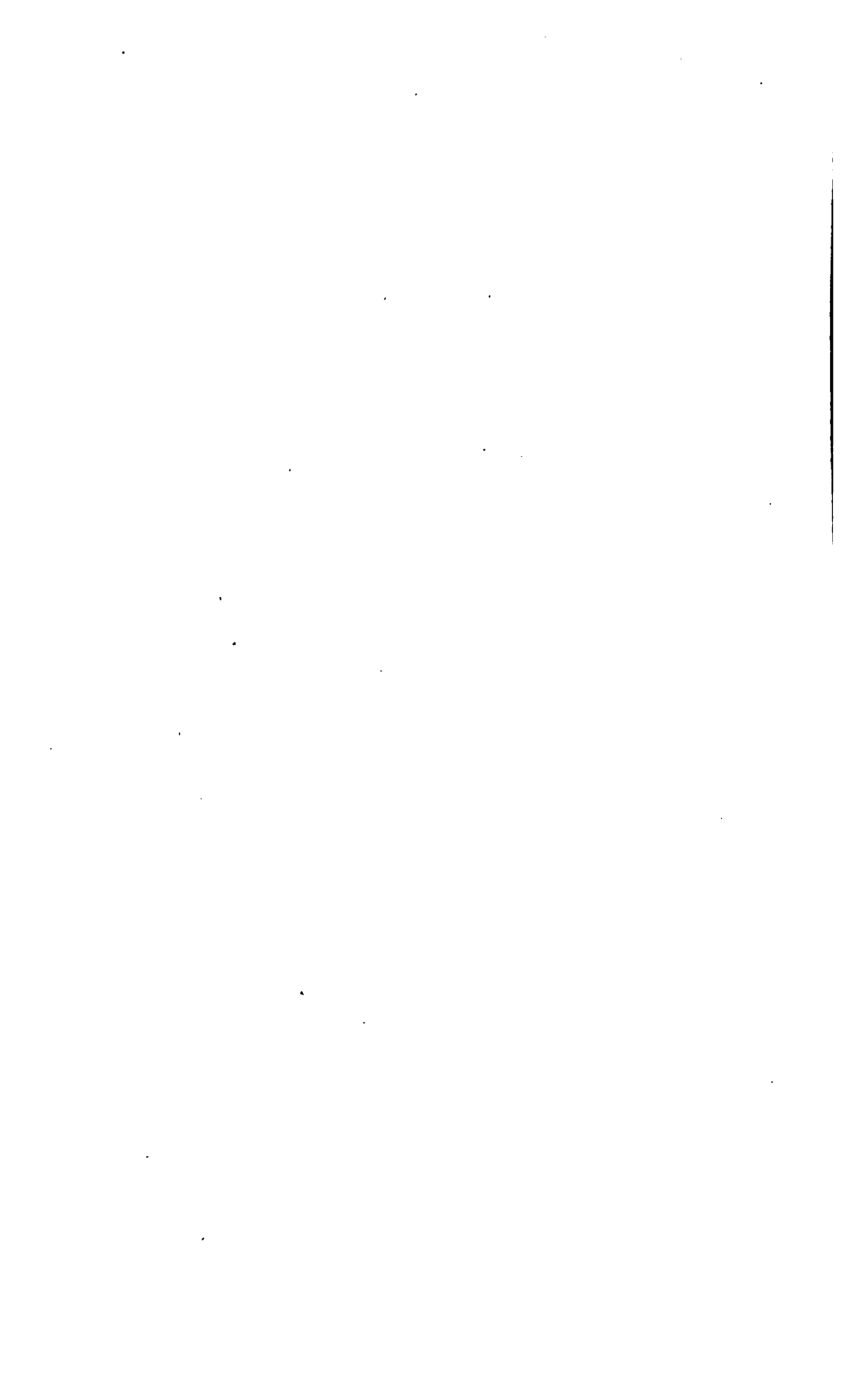
7. Where an order was obtained, under the Writ of Trial Act, for a trial before the sheriff, and the sum indorsed upon the writ was 58*l.*:—*Held*, that the verdict must be set aside, though both parties had gone to trial before the sheriff without making any objection. *Edge v. Shaw*, 189

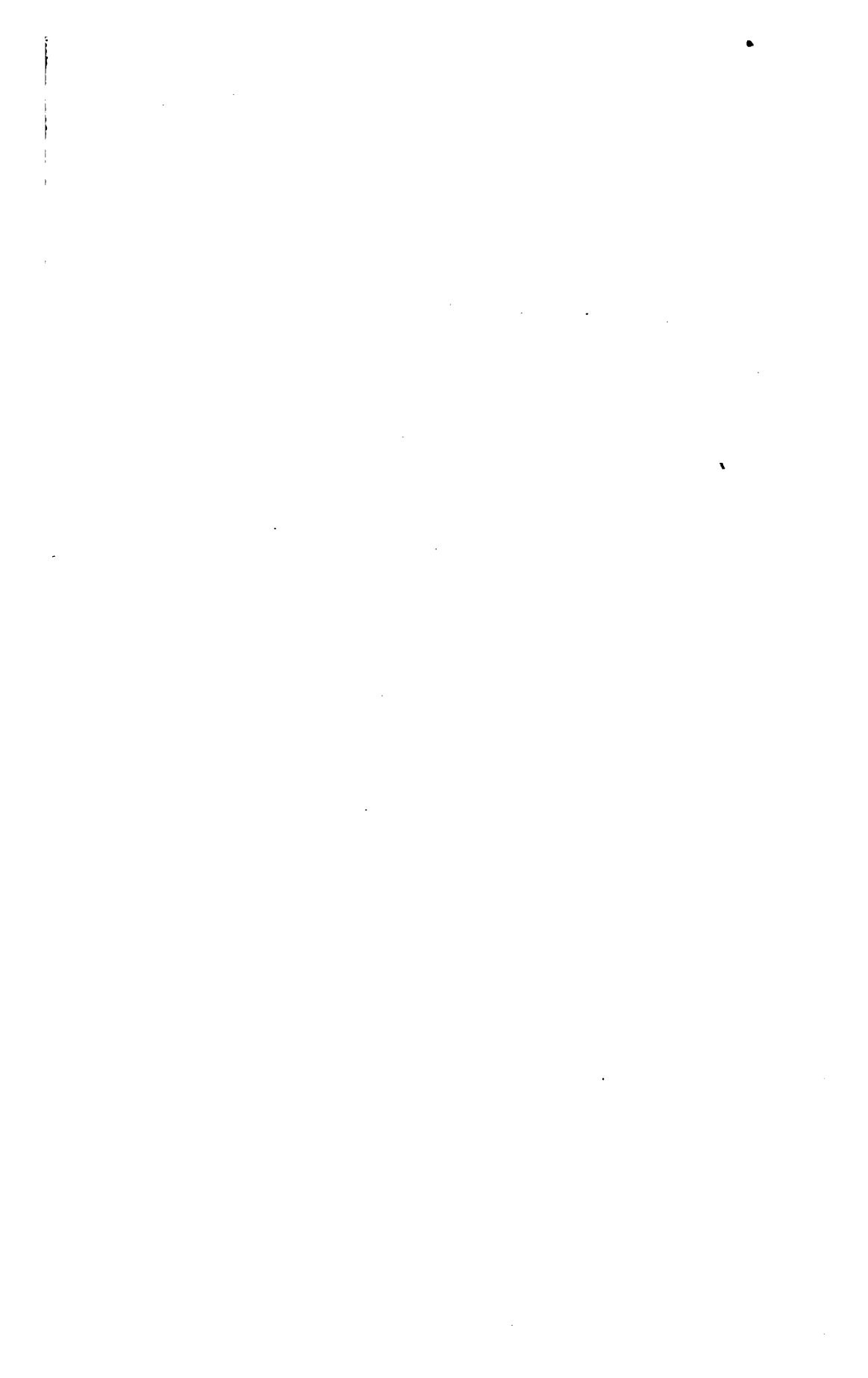
8. Where a cause is proper to be tried by the sheriff under the Writ of Trial Act, but by mistake a larger sum is indorsed on the writ than the plaintiff claims, and than is allowed by the act, the Court will allow the writ to be amended. *Ib.*

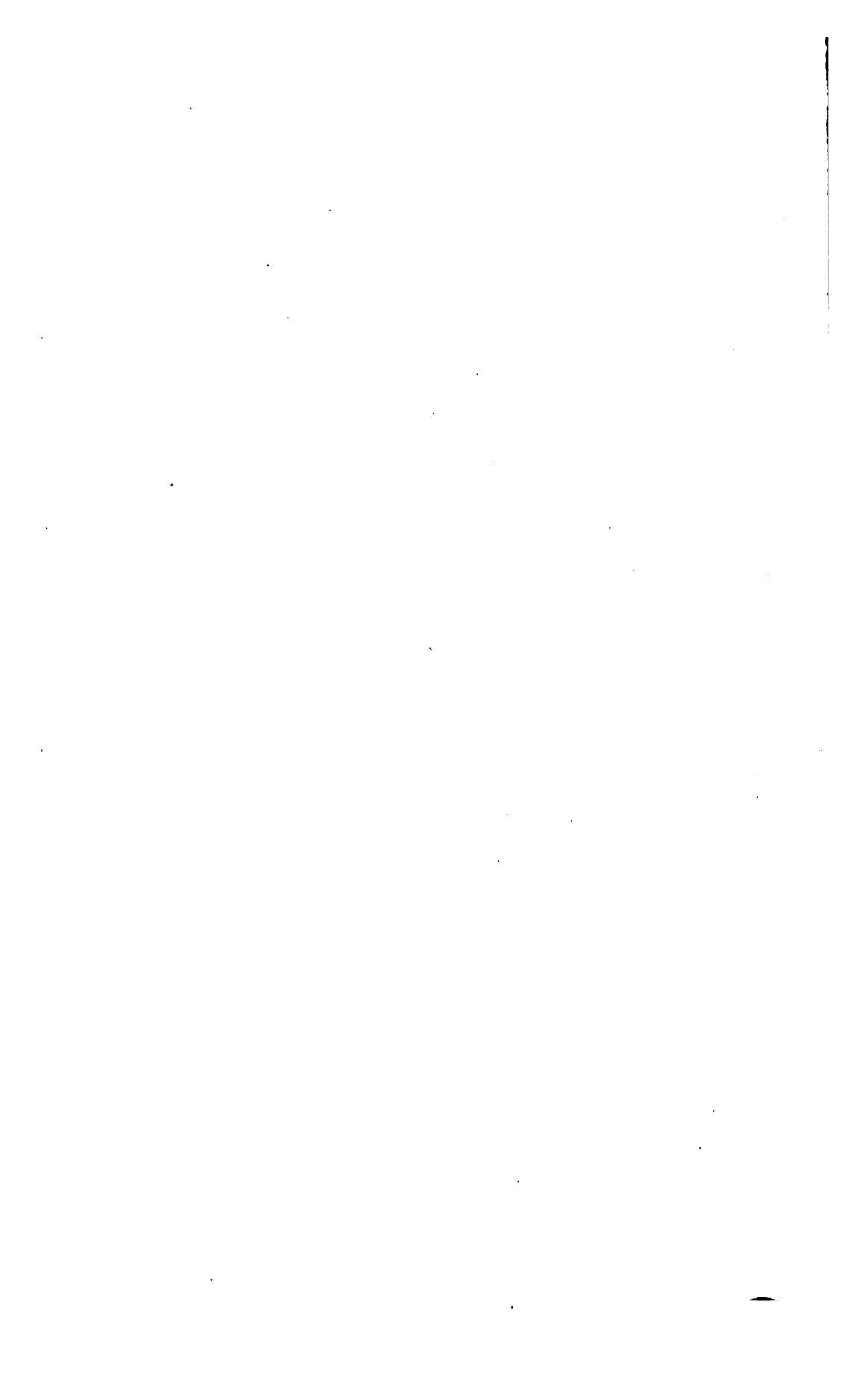
9. Where a rule for a new trial is moved for on the under-sheriff's notes, on the ground of the absence of evidence to warrant the verdict of the jury, it is not competent for the other party to use affidavits. *Jones v. Howell*, 176

10. On moving to set aside a verdict on a trial before the under-sheriff, on an objection founded upon the pleadings, it is not necessary to have an affidavit of the pleadings, as the *postea* is supposed to be in Court. *Milligan v. Thomas*, 373

11. Where a defendant obtains an order for trial before the sheriff, under the Writ of Trial Act, a Judge has no power to impose terms upon the plaintiff against his consent, as to the time of trial. *Wright v. Skinner*, 727







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